LEGISLATIVE RESEARCH COMMISSION

HAZARDOUS WASTES STRICT LIABILITY

REPORT TO THE 1985 GENERAL ASSEMBLY OF NORTH CAROLINA

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STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

December 13, 1984

TO THE MEMBERS OF THE 1985 GENERAL ASSEMBLY:

The Legislative Research Commission herewith reports on the matter of strict liability for damages resulting from hazardous wastes in North Carolina to the 1985 General Assembly. This report is made pursuant to Chapter 1112 (HB 738) of the 1983 Session Laws (1984 Regular Session).

This report was prepared by the Legislative Research Commission's Hazardous Wastes Strict Liability Study Committee and is transmitted as amended by the Legislative Research Commission for your consideration.

Respectfully submitted,

Liston B. Ramsey

W. Craig Lawing

Cochairmen
Legislative Research Commission

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INTRODUCTION

INTRODUCTION

The North Carolina Legislative Research Commission, created by Article 6B of Chapter 120 of the General Statutes, is an interim study organization of the General Assembly. The Commission is cochaired by the President Pro Tempore of the Senate and the Speaker of the House of Representatives, and the Cochairmen appoint five members from their respective houses. G.S. 120-30.10(a). Among the duties of the Commission is that of making or causing to be made, upon the direction of the General Assembly, "such studies of and investigation into governmental agencies and institutions and matters of public policy as will aid the General Assembly in performing its duties in the most efficient and effective manner" and reporting "to the General Assembly the results of the studies made." G.S. 120-30.17 (1),(2). These reports "may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations." G.S. 120-30.17(2).

At the direction of the 1983 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects, which have been arranged into broad categories according to related subject matters. Each member of the Commission was delegated the responsibility of overseeing one group of studies and causing the findings and recommendations of the various study committees to be reported to the Commission.

See Appendix A for a list of the Commission members. Pursuant to G.S. 120-30.10 (b) and (c), the Commission Cochairmen appointed study committees consisting of legislators and public members to conduct the studies. Cochairmen, one from each house of the General Assembly, were designated for each committee.

The Legislative Research Commission was authorized by Chapter 1112 (HB 738) of the 1983 Session Laws (1984 Regular Session) to study the issue of strict liability for damages resulting from hazardous wastes in North Carolina. See Appendix B for pertinent provisions of HB 738 authorizing this study. The Legislative Research Commission thus created the Hazardous Wastes Strict Liability Study Committee, which is cochaired by Senator Henson P. Barnes and Representative William E. Clark. See Appendix C for a list of members and staff.

BACKGROUND

BACKGROUND

North Carolina ranks eleventh in the nation in terms of hazardous wastes products generated in the state. Industries that generate hazardous wastes include the textile, furniture, agricultural, paper, and chemical industries. There are approximately 700 major hazardous waste generators, which are defined as generators that produce more than 2,200 pounds of hazardous waste per month, and 150 facilities that treat, store, or dispose of hazardous wastes in this state. Thus, considerable attention has been focused on the safe management of hazardous waste and the liability to be imposed on those generating, transporting, storing, treating, and disposing of hazardous wastes.

In the Waste Management Act of 1981, the General Assembly stated that "[t]he safe management and disposal of these wastes are essential to continued economic growth and to protection of the public health and safety." G.S. 143B-216.10(c). Thus, the Waste Management Act of 1981 was passed "to prescribe a uniform system for the management of hazardous waste." G.S. 143B-216.10(b). The Act also created the Governor's Waste Management Board and assigned it various duties. One of the duties was to report to the General Assembly on or before January 1, 1983 on "the desirability of establishing by statute a standard of strict liability for persons involved in storage, transportation, treatment, or disposal of hazardous or low-level radioactive waste in North Carolina." G.S. 143B-216.13(3). In its 1982 Annual Report the Governor's Waste

Management Board recommended the creation by statute of strict liability for hazardous wastes in North Carolina. See Appendix D for a copy of the report.

In response to the report of the Governor's Waste Management Board, Representatives Clark and Hackney introduced House Bill 738, "An Act to Provide for Strict Liability for Damages Resulting from Hazardous Wastes in North Carolina." The House of Representatives passed a committee substitute and sent the bill to the Senate. The Senate adopted its own committee substitute, which authorized the Legislative Research Commission to study the issue of strict liability for damages resulting from hazardous wastes in North Carolina.

COMMITTEE PROCEEDINGS

COMMITTEE PROCEEDINGS

The Committee met in the Legislative Building on the following dates: October 12, 1984, November 9, 1984, and November 30, 1984.

At the Committee's October 12 organizational meeting, the members were briefed on the background of the Committee, the current status of the law, the reporting dates, and the powers of the Committee. The Committee also heard from several speakers who represented differing viewpoints.

The first speaker was Mr. Glenn Dunn, an attorney with the Department of Natural Resources and Community Development. Mr. Dunn presented an overview of strict liability generally and outlined both the statutory and common law remedies available to someone suffering injuries from hazardous wastes in North Carolina. He questioned whether the existing remedies are adequate to insure that people who are injured receive just compensation.

Mr. Dunn also explained two major federal programs--the Resource Conservation and Recovery Act (RCRA) and the Super Fund Program, the Comprehensive Environmental Response and Compensation Liability Act (CERCLA). Neither of these programs provides a private remedy for individuals injured by hazardous wastes. Mr. Dunn then explained the North Carolina Oil Pollution and Hazardous Substances Control Act, Article 21A of Chapter 143 of the General Statutes, which supplies a private remedy but only if a person can show that he was injured by oil or a hazardous substance discharged on or near State waters.

Mr. Dunn stated that the Committee should consider the following issues when dedicing whether to recommend the creation of strict liability by statute:

1. Economics--should a hazardous wastes activity bear more of the cost associated with the activity by more liberally compensating people who are injured by the activity? Should these costs be internalized into the cost of the product by requiring those engaged in the activities to pay more of the cost through more liberal laws?
2. Efficiency consideration--does applying strict liability encourage more lawsuits by providing more liberal recovery provisions? Will more people bring lawsuits to recover? Or, would claims be settled more quickly because there are less defenses available?
3. Moralistic viewpoint--there is a premise stemming from the common law that it is unfair to make people pay for injuries when they behave as reasonably as they know how at the time they engage in the activity that causes injury and in a sense were not at fault in any moral sense. Or, is it more unfair to have injured people go uncompensated regardless of the alleged fault of the people engaged in the activities?

Dr. Linda Little, Executive Director of the Governor's Waste Management Board, was the next speaker. She summarized the work of the Governor's Waste Management Board and explained why the Board recommended the adoption of strict liability for damages resulting from hazardous wastes in North Carolina.

See Appendix D for the Report and Recommendations on Liability Issues in the Area of Waste Management by the Governor's Waste Management Board. Dr. Little indicated that the Board's recommendation that strict liability apply to successors in interest was the only recommendation not incorporated in HB 738.

Dr. Little then summarized the Board's position as follows:

1. Recovery of actual damages by persons proved to have been damaged by hazardous wastes occurrences should be facilitated.
2. The handlers of hazardous wastes should be responsible for insuring that wastes are managed properly so as to minimize the risk of injuries and to compensate victims for actual damages.
3. The cost of compensation for injuries and for the appropriate liability insurance could and should be passed on by the handler and reflected in the cost of his services or products provided.

Ms. Jan Ramquist, League of Women Voters, was the next speaker and spoke in favor of strict liability. She stated that the purpose of strict liability is two-fold. First, it attempts to clarify who is financially responsible for clean up, personal injury, and property damage of any accidents. The second goal is to encourage the safest possible handling of hazardous wastes. She urged the Committee to recommend the adoption of strict liability because it was an opportunity to improve the public trust regarding the state's and industries' willingness to protect public health. She also stated that strict liability was not designed to assign blame to anyone but to provide for the recovery of damages incurred. See

Appendix E for a copy of Ms. Ramquist's statement.

The next speaker was Mr. Bill Holman, North Carolina Sierra Club and Conservation Council of North Carolina, who also spoke in favor of strict liability. He stated that HB 738 was a good base on which the Committee could start its work.

Mr. Joe Harwood, North Carolina Citizens for Business and Industry, spoke in opposition to the concept of strict liability as stated in HB 738. He listed the following reasons for his opposition:

1. Hazardous and toxic wastes are an inherent by-product of daily household living and industrial processing.
2. HB 738 makes generators, treaters, storers, and disposers of hazardous waste, who are already regulated under a myriad of state and federal laws and regulations on the subject of hazardous waste management, strictly liable for bodily injury and property damage caused by those wastes when under their control, and generators strictly liable even when the wastes are not under their control.
3. There is no limit on the amount of damages that can be awarded under HB 738 except in the situation where the state is the defendant.
4. The statute of limitations for bringing a suit is extended from three years to thirty years.
5. The available defenses under HB 738 are few and extremely limited.

6. Passage of a strict liability law, such as HB 738, would impede the industrial development in North Carolina of specifically the so called clean high technology industries as well as the more research oriented industries.

7. Many insurance companies have refused to insure under state strict liability laws.

8. Punitive damages should never be applied in the law except against persons who intend to harm someone, or act in such a willful, wanton, or reckless manner that harm to someone is the probable consequence.

See Appendix F for a copy of Mr. Harwood's remarks.

Mr. Carson Carmichael, American Insurance Association, was the final speaker and expressed concern that any liability system be reasonable, equitable, and insurable. He stated that the insurance industry wholeheartedly supported efforts to clean up the environment. The industry, however, opposes a liability system that removes standards of due care and principles of fault and causation from a finding of liability. See Appendix G for a copy of Mr. Carmichael's report.

At the November 9, 1984 meeting, the Committee reviewed House Bill 738, second edition, section by section. The Committee noted several sections that needed further discussion. The Committee also examined statutes from other states that have adopted strict liability by statute. Further, the Committee Staff presented the members with a copy of a report by the Minnesota Waste Management Board on the availability of liability insurance. See Appendix H for a copy of this report.

At the final meeting on November 30, the Committee concluded its discussion of House Bill 738, second edition. The Committee then voted to recommend the creation by statute of strict liability for damages resulting from hazardous wastes in North Carolina. See Appendix I for the recommended legislation.

FINDINGS AND RECOMMENDATIONS

FINDINGS AND RECOMMENDATIONS

RECOMMENDATION 1: The North Carolina General Assembly should adopt by statute strict liability for damages resulting from hazardous wastes in North Carolina.

It is well established that there is a need to provide for a method of compensation for personal injuries and property damage arising out of accidents. Under the traditional common law tort system, the injured party was required to show fault on the part of the person from whom he sought recovery. The rationale was that since there had been an accident, there must be a reason to shift the burden of the injury from the injured party. Under certain circumstances, such as blasting, the person carrying on the activity was held strictly liable for any injury incurred. The rationale for imposing liability without a showing of fault was that the business was so dangerous that the risk of injury should be on the person conducting the business. The cost was considered to be a cost of doing business.

It is argued that the traditional common law tort system, which requires a showing of fault, is an inadequate method of providing for compensation for parties suffering injury from hazardous wastes. It also is argued that because of the danger involved in hazardous wastes, the persons responsible for the wastes should bear the costs of the injuries. For these reasons, the Hazardous Wastes Strict Liability Study Committee recommends that the General Assembly adopt by statute

strict liability for damages resulting from hazardous wastes. Strict liability, however, should apply only to injuries resulting from risks associated with the characteristics that make the waste hazardous.

It is possible that the North Carolina courts, if presented with the issue, would adopt strict liability for damages resulting from hazardous wastes. It is uncertain, however, when the courts, and under what circumstances, will be presented with the issue. There are several reasons why it is preferable for the General Assembly to adopt strict liability. First, a statute would provide certainty as to the law in the area for both injured citizens and industry. A court decision would be limited to the particular facts of the case. Second, when adopting strict liability policy decisions need to be made, and these are best made by the General Assembly. Examples of the policy decisions include who is to be held liable, what defenses are available, and what the statute of limitations will be. Third, the General Assembly can define what constitutes a hazardous waste. See Appendix D for a discussion by the Governor's Waste Management Board on why strict liability should be adopted.

RECOMMENDATION 2: Governmental immunity from strict liability for damages caused by a hazardous waste occurrence should be waived only to the extent that the damages do not exceed the amount authorized by the North Carolina Tort Claims Act, G.S. 143-291.

The North Carolina Tort Claims Act, G.S. 143-291, establishes the maximum amount of damages that the State can be liable for in a negligence action. State agencies are authorized

to procure insurance for the amount of damages they may be liable for. The effect of the Act is to expand the rights of a person injured by the act of an employee of the State by partially waiving sovereign immunity. The Act, however, does not give the injured person the same rights he would have against a private individual since there is a limit on the amount of damages. This Committee has found no reason to adopt a different system for hazardous wastes occurrences than that currently used for negligence actions. Thus, the Committee recommends that governmental immunity should be waived only to the extent that the damages do not exceed the amount authorized by the North Carolina Tort Claims Act, G.S. 143-291.

RECOMMENDATION 3: The person in control of a hazardous waste at the time of a hazardous waste occurrence should be strictly liable for resulting damages. The generator of a hazardous waste, however, should be strictly liable, jointly and severally, with the person in control of the waste at the time of the occurrence. The liability of the generator should end when the waste is transferred to a hazardous waste facility in accordance with federal and State requirements.

The Committee feels that the preferable approach is to hold the person in control of the hazardous waste at the time of the occurrence strictly liable. The generator, however, should remain liable through the transport stage. This encourages the generator to select a reputable transporter. The generator's liability should terminate when the hazardous waste is transferred to a hazardous waste facility in accordance with federal and State requirements. The rationale for this rule is that

once the generator has done everything required by law to get the waste to a proper site the generator's liability should end.

RECOMMENDATION 4: The following defenses should be available to a strict liability action: that the claimant had knowledge of the danger and voluntarily and unreasonably encountered that danger and that the hazardous waste occurrences was caused solely by an act of God, an act of war, an act of sabotage, or an intentional act or omission of a third party.

In certain circumstances it is unfair to hold the person in control of the hazardous waste at the time of the occurrence strictly liable. Thus, a limited number of defenses should be made available. The first such defense is when the claimant had knowledge of the danger and voluntarily and unreasonably encountered the danger. A person who encountered the danger under those circumstances should bear the cost of the damages. Also, there should be no liability if the occurrence was caused by an act of God, an act of war, an act of sabotage, or an intentional act or omission of a third party.

RECOMMENDATION 5: Punitive or exemplary damages should not be available.

Damages awarded in tort actions generally are either compensatory or punitive. Compensatory damages are designed to compensate a person for the injuries he suffered. Punitive damages are designed to punish a wrongdoer for his intentionally wrongful conduct.

The purpose of adopting strict liability for damages resulting from hazardous wastes is to provide a means whereby the injured party may seek compensation for his injuries. A strict liability action does not concentrate on either the fault or the intentions of the party being held liable. Thus, the Committee recommends that punitive or exemplary damages not be available.

RECOMMENDATION 6: The availability of a cause of action under the theory of strict liability should not prohibit a claimant from electing to pursue an existing cause of action under statutory or common law, or from exercising any right to seek enforcement of any standard or the imposition of civil or criminal sanctions.

The adoption of strict liability by statute is designed to provide a claimant with an additional means of seeking recovery for his injuries. The purpose is not to foreclose any existing remedies. Thus, the Committee recommends that the availability of a cause of action under strict liability should not prohibit a claimant from electing to pursue other remedies.

RECOMMENDATION 7: The time period in which a cause of action for strict liability accrues should be limited to thirty years from the last act or omission of the defendant giving rise to the cause of action.

G.S. 1-52(16) provides that in regard to personal injury or property damage, the cause of action shall not accrue until the injury "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." It further provides that no cause of action can accrue more than ten years from the last act or omission of the defendant. This statute covers the situation in which a person suffers injury from an act or omission of the defendant, but the injury is not discovered at the time of the act or omission of the defendant. Without the statute, an injured person's claim might be barred by the statute of limitations before the injury is discovered. The statute also recognized, however, that the defendant's potential liability should not continue indefinitely. Thus, a period is established beyond which no cause of action accrues.

The Committee believes that the above policy should be continued in actions for strict liability for damages resulting from hazardous wastes. Because it may be several years before a person discovers he has suffered personal injury or property damage from hazardous waste, the ten year period currently used in G.S. 1-52(16) should be expanded. Thus, the Committee recommends that the time period in which a cause of action for strict liability accrues should be thirty years from the last act or omission of the defendant giving rise to the cause of action.

MINORITY REPORT

MINORITY REPORT
TO
THE LEGISLATIVE RESEARCH COMMISSION REPORT
TO THE 1985 GENERAL ASSEMBLY
ON
HAZARDOUS WASTE STRICT LIABILITY

This is a minority report to the Legislative Research Commission's Report to the 1985 Session of the North Carolina General Assembly concerning strict liability for hazardous waste occurrences (the "Report"). This minority report is being included in the Report at the request of the undersigned, who served as a member of the Hazardous Waste Strict Liability Study Commission (the "Study Commission"), and in accordance with a motion passed by the Study Commission stating its desire and intention to have this minority report included in its report to the Legislative Research Commission.

The proposed bill attached as Appendix I to this Report (the "Proposed Bill") is unwarranted for the reasons stated herein. The Proposed Bill does not differ in any substantial way from House Bill 738 introduced by Representatives Clark and Hackney during the 1983-84 Session of the General Assembly ("HB 738"). The General Assembly did not pass HB 738 as introduced, but passed a drastically revised version of that bill which created this Study Commission to study the issue further.

It appears that the General Assembly declined to pass HB 738 as introduced, because there was no clearly demonstrated need for it, and because of the substantial problems it was likely to cause for industry. This has not changed. The testimony and data presented to this Study Commission have not established any clear need for this legislation.

Information presented to this Commission did demonstrate that the passage of the Proposed Bill could create problems for North Carolina in attracting and

keeping good businesses, and create problems for industry in running and insuring their operations. If North Carolina adopts legislation such as the proposed bill, we will encounter the same problems as did the State of Minnesota, as described in the attached article from the Wall Street Journal,* which is incorporated by reference herein.

The Study Commission has failed to address the general idea of strict liability and what is to be accomplished in passing a bill similar to HB 738 or the Proposed Bill. Several reasons have been advanced to justify the adoption of such legislation. Although none of those purported reasons are persuasive, they are summarized below for the purpose of discussion:

(1) To affect public perception. The general public wants to feel protected from hazardous waste occurrences

(2) To encourage a higher standard of care by people who handle hazardous waste

(3) To just expand liability, i.e., include more things than would be included under general negligence, by changing standards of causation, proof, or statute of limitations.

However, none of these reasons or justifications for the Proposed Bill--indeed for strict liability--are persuasive. For instance, is it necessary or advisable to expand liability? What is the effect on insurability? What is the effect on North Carolina's jobs, exports and economy as a whole?

Certainly, the issue of judgment-proof defendants should be dealt with, but the Proposed Bill is not the appropriate vehicle for dealing with that problem. Midnight dumpers and fly-by-night bankrupt hazardous wastes operators should be punished and their damage corrected. However, the Proposed Bill would not reach them or their activities. They are the turnips that you can't get blood out of, no matter whether you squeeze them with

* The Legislative Research Commission deleted this article. The citation for the article is Carlson, Minnesota's Pollution Statute Generates Boycott by Insurers, WALL STREET JOURNAL, October 23, 1984, at 31, col. 1.

strict liability or negligence. A different kind of bill is needed to deal with this problem of "midnight dumpers."

The following are reasons why the Proposed Bill should not be adopted:

1. Strict liability does not encourage greater care, because it is conceptually unrelated to a standard of due care. Strict liability would result in liability, no matter how much care one uses in handling hazardous waste. Even if there is no negligence, if there is damage, the business and industry utilizing extreme care in hazardous waste management would still be liable under the Proposed Bill or, indeed, under any similar strict liability standard. Thus, it seems to be inappropriate to assume that the Proposed Bill would encourage greater care in hazardous waste management.

2. No North Carolina court has pointed to an instance where strict liability was needed for hazardous waste occurrences, but not available. At the first meeting of the Study Commission, Mr. Glenn Dunn and Mr. O.W. Strickland from the Solid and Hazardous Waste Management Branch of the North Carolina Department of Human Resources informed the Committee that they did not know of any instance where we needed strict liability. They pointed out one incident that appeared to be adequately covered by worker's compensation.

3. The concerns of industry were presented to the Study Commission by North Carolina Citizens for Business and Industry. Those concerns included costs, uncertainty of scope of liability, unfairness, the possibility of personal liability, the lack of a costs limitation, the effect on the burden of proof and the lack of insurability. The particular problems relating to uninsurability were expanded upon by the American Insurance Association's statement to the Study Commission. No form of strict liability discussed or studied by the Study Commission adequately addresses these problems and

uncertainties that business and the insurance industry predict will be imposed by such legislation.

4. At the first meeting of the Study Commission, Mr. Glenn Dunn presented an extensive discussion of the common law remedies available to persons who are injured under circumstances to be covered by the Proposed Bill. Although it was Mr. Dunn's opinion that these remedies were inadequate, this is far from clear. As Mr. Dunn noted, strict liability is available under common law for "ultrahazardous activities," as well as for "dangerous instrumentalities." If hazardous waste causes damages or harm because of its "hazardous" or "dangerous" nature, the injured party could sue under strict liability. No legislation would be, or is, needed. Moreover, the alternative remedies of negligence, trespass, and nuisance are also available for an injured party.

5. Strict liability for environmental clean-up is established under existing federal law. There are numerous federal laws and regulations which control the production and handling of hazardous waste. A few of these are the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, et seq. (also known as "CERCLA" or "Superfund"); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, et seq. (also known as "RCRA"); and the Toxic Substances Control Act, 15 U.S.C. §§ 2601, et seq. (also known as "TSCA"). However, Congress has considered, but similarly rejected, proposed legislation such as the Proposed Bill (and HB 738).

6. The North Carolina General Assembly has also extensively regulated the production and handling of hazardous wastes. For instance, in 1969, the General Assembly passed a Solid and Hazardous Waste Act, which was codified in Chapter 130 of the North Carolina General Statutes. This act has been

amended during every session of the North Carolina General Assembly since 1975. During the last Session of the General Assembly, this act was, again, amended to toughen its terms and broaden its coverage and was recodified in Chapter 130A of the General Statutes. As part of the compromise to obtain industry and environmentalist support for that recodification, strict liability was dropped from the draft legislation prior to passage.

7. The General Assembly also passed in 1973 the Oil Pollution and Hazardous Substances Control Act, which was codified as Article 21 of Chapter 143 of the General Statutes. This statute already provides for strict liability under certain narrow, but appropriate, circumstances. There is no evidence as to the activity that this act has generated. However, any experience under that act would not be an accurate predictor of the likely affect of the Proposed Bill, which creates a private cause of action. One of the primary beneficiaries of the Proposed Bill will be the lawyers, who will collect greater fees from the increased litigation that the Proposed Bill will likely engender.

8. The Proposed Bill contains too many uncertainties. Specifically, the Study Commission was told by staff and public speakers alike that no one can accurately predict the extent of the cost that the Proposed Bill would impose on business. No one appearing before the Study Commission was able to assess the total social costs that would result from the loss of jobs that may result from such legislation (if business is unable to secure insurance or is otherwise unable to operate under the legislation). Likewise, no one was able to assess the social costs from the greater expense to be born by the public in the form of higher prices (assuming business is able to get insurance and is otherwise willing and able to do business under legislation such as the Proposed Bill).

9. The passage of legislation such as the proposed bill will not cure the public's fear and skepticism when its comes to hazardous waste and its handling and regulation. The concept of strict liability is unfair, because it makes a person or company liable for an occurrence no matter how much care was taken and even if all regulations were followed.

CONCLUSION

There is no need for the legislation. However, if there is a perceived need to pass legislation such as the Proposed Bill, then do so by creating a state-run mechanism for compensation funded out of the general revenues.

Even if a need to adopt strict liability were demonstrated--and it was not demonstrated to the Study Commission--any bill establishing a strict liability standard should contain the following provisions:

- Limits on liability, such as those afforded to the State under the Proposed Bill

- Additional defenses, such as those contained in the Oil Pollution and Hazardous Substances Control Act, which was codified as Article 21 of Chapter 143 of the General Statutes, including defenses of acts by third parties and contributory negligence

- Exclusions of punitive damages and damages for pain and suffering, together with an election of remedies provisions such as is found in North Carolina's workman compensation laws

The handling and disposal of hazardous waste in North Carolina is a matter of great concern to the public of the State. However, no need has been established for the passage of a law which would apply a strict liability standard for a hazardous waste occurence and create a new cause of action for the bringing of lawsuits to enforce this liability. Hazardous waste is extensively regulated by State and federal authorities. Industry is not being uncooperative: they are just trying to be careful. The potential adverse effects on North Carolina's economy and jobs outweighs any benefits of a law

designed to address some hypothetical problem which has never arisen in North Carolina.

Charles D. Case

APPENDICES

APPENDIX A

LEGISLATIVE RESEARCH COMMISSION

Senator W. Craig Lawing, Cochairman
Senator William N. Martin
Senator Helen R. Marvin
Senator William W. Staton
Senator Joseph E. Thomas
Senator Russell Walker

Representative Liston B. Ramsey, Cochairman
Representative Christopher S. Barker, Jr.
Representative John T. Church
Representative Bruce Ethridge
Representative John J. Hunt
Representative Margaret Tennille

APPENDIX B

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1983

H 4

HOUSE BILL 738
Committee Substitute Favorable 7/8/83
Senate Committee Substitute Adopted 6/25/84
Fourth Edition Engrossed 6/26/84

Short Title: Strict Liab. Hazardous Wastes. (Public)

Sponsors: Representative

Referred to: Water & Air Resources.

April 7, 1983

A BILL TO BE ENTITLED

AN ACT TO AUTHORIZE THE LEGISLATIVE RESEARCH COMMISSION TO STUDY THE ISSUE OF STRICT LIABILITY FOR DAMAGES RESULTING FROM HAZARDOUS WASTES IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

Section 1. The Legislative Research Commission is authorized to study and report to the 1985 General Assembly on the following issues:

(1) the feasibility of creating a strict liability system for hazardous wastes;

(2) the advisability of waiving governmental immunity from strict liability for damages caused by hazardous waste occurrence to the extent that the damages [S-~~it no xxx~~] exceed the amount authorized by the North Carolina Tort Claims Act, G.S. 143-291;

(3) whether a person in control of a hazardous waste at the time of a hazardous waste occurence should be strictly liable for resulting damages;

(4) whether the generator of a hazardous waste should be strictly liable for damages caused by the generated waste, jointly and severally with the person in control of the waste at the time of the occurrence;

(5) the advisability of creating a defense to strict liability that the claimant had knowledge of the danger and voluntarily and unreasonably encountered that danger;

(6) the advisability of creating defenses to strict liability for occurrences caused solely by an act of God, an act of war or sabotage, or an intentional act or omission of a third party not an employeee, agent, or contractor of the defendant;

(7) the feasibility of relieving from liability a defendant who has transferred the hazardous waste to a hazardous waste facility in accordance with federal and State requirements [S-~] [S-, or other defenses;]

(8) the advisability of providing for punitive or exemplary damages for hazardous waste occurrences;

(9) whether the availability of a cause of action under the theory of strict liability should prohibit a claimant from electing an existing cause of action under statutory or common law, or from exercising any right to seek enforcement of any standard or the imposition of civil or criminal sanctions; and

(10) the advisability of restricting the period of time in which a cause of action for strict liability shall accrue..

Sec. 2. This act is effective upon ratification..

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1983

H 4

HOUSE BILL 738
Committee Substitute Favorable 7/8/83
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APPENDIX C

1984 HAZARDOUS WASTES STRICT LIABILITY STUDY COMMISSION

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APPENDIX D

REPORT AND RECOMMENDATIONS ON LIABILITY ISSUES IN THE AREA OF WASTE MANAGEMENT

Including

A Report on the Desirability
of Establishing by Statute
a Standard of Strict Liability

Prepared by

The
Governor's Waste Management Board

1. Introduction and Acknowledgements

The Waste Management Act of 1981 created the Governor's Waste Management Board to perform a number of functions relating to the safe management and disposal of hazardous wastes and low-level radioactive wastes in North Carolina. Among these mandated functions is the following:

> The Board shall study and make recommendations on policy issues including but not limited to liability and financial responsibilities within the waste management area. On or before January 1, 1983, the Board shall prepare and present to the Governor and General Assembly a report concerning the desirability of establishing by statute a standard of strict liability for persons involved in storage, transportation, treatment, or disposal of hazardous or low-level radioactive waste in North Carolina.

To carry out this mandate, the Waste Management Board referred the matter to its Legal Committee for study and recommendations. The Legal Committee is chaired by Charles Holt, former State Representative from Cumberland County. In addition to Representative Holt, the Committee is constituted of the two Board members who are members of the legal profession; Heman Clark, former Superior Court Judge and presently Secretary of the North Carolina Department of Crime Control and Public Safety, and William Graham, former member of the North Carolina Court of Appeals and presently Senior Vice President and General Counsel for Carolina Power and Light. The fourth member of the Committee is Melvin Hearn, Deputy Secretary of the North Carolina Department of Agriculture. Glenn Dunn, Attorney with the Solid and Hazardous Waste Management Branch of the North Carolina Department of Human Resources was the Staff Coordinator for the Committee's study.

The composition of the Committee brought an excellent combination of viewpoints to bear on a subject which demands a blend of policy considerations and technical understanding of a complex area of the law. The Committee requested and received valuable assistance from Robert Byrd, Professor of Torts and former Dean of the School of Law at the University of North Carolina at Chapel Hill.

In addition to Professor Byrd's assistance, the Committee benefitted greatly from the viewpoints and expertise of other persons or organizations. The Committee was fortunate to have had available to it since September 1982, a very thorough Report to Congress entitled Injuries and Damages from Hazardous Wastes - Analysis and Improvements of Legal Remedies. This Report is the culmination of a year-long study conducted by a carefully chosen group of lawyers with a variety of viewpoints and considerable expertise. One member of the group that produced the report was George C. Freeman, Jr., of Hunton and Williams, a law firm in Richmond, Virginia, with an extensive environmental law practice. Mr. Freeman, with considerable assistance from Alfred Light, also of the firm, donated much time and expertise to the efforts of the Legal Committee and attended several meetings.

With the aid of the above-mentioned persons and groups, the Committee reached its recommendations and presented them to the Waste Management Board at a public meeting held in Raleigh on December 1, 1982. Comments were received at that meeting from the following: John Runkle, Conservation Council of North Carolina; Dan Stroh, North Carolina Sierra Club; Wes Hart, North Carolina CATCH; and Cathy Markatos, Tri-County Alliance.

After considerable discussion, the Board accepted the recommendations set forth in the remainder of this report for presentation to the Governor and General Assembly. These recommendations were made only in regard to hazardous waste. The Governor's Waste Management Board will soon file a Supplemental Report addressing whether or not strict liability should apply to low-level radioactive waste.

II. Description of the Hazardous Waste Problem

The discussion of legal issues related to liability for injuries from hazardous wastes is necessarily hampered by inadequate factual and scientific knowledge. At this time it is impossible to determine the potential threat of personal injury and property damage posed by the various activities associated with hazardous waste, either in the nation as a whole or in North Carolina. Furthermore, the Board found itself handicapped by its incomplete understanding of what substances the full range of hazardous wastes includes and how hazardous those substances really are.

Despite this uncertainty, there is justified concern over the health consequences of transporting, treating, storing or disposing of hazardous waste. It is certain that the amount and variety of hazardous waste generated in our society is increasing at a tremendous rate. It is also certain that in the past some of this waste has been handled in an improper manner, particularly in areas of the country that became industrialized earlier than North Carolina. Fortunately, large chemical dumps, such as Love Canal, that have caused major environmental or health problems, did not accumulate in North Carolina twenty or thirty years ago.

Today, however, North Carolina has more than caught up with other parts of the nation in the generation of hazardous industrial by-products.

The textile, furniture, agricultural, paper, and chemical industries that are so important to this state all generate hazardous waste. North Carolina has been ranked eleventh in the nation in generating hazardous waste products. A survey indicates that North Carolina has approximately 700 major hazardous waste generators - i.e. generators that produce more than 2,200 pounds of hazardous waste per month. There are approximately 250 facilities that treat, store or dispose of hazardous waste in this state.

North Carolina also has suffered in recent times from improper disposal of waste such as the illegal dumping of PCB laden oil along more than two hundred miles of roadside.

Despite the increasing problems, this state still has suffered relatively little damage from hazardous waste up to this time. Furthermore, the swift and thorough implementation of a hazardous waste regulatory program should substantially reduce the probability of improper waste handling practices. North Carolina has been among the first states to gain authorization to implement the hazardous waste regulations adopted under the Federal Resource Conservation and Recovery Act (RCRA). The regulations require a "manifest" or tracking system which documents the kind and amount of waste produced by a generator and traces the waste until it is properly rendered non-hazardous or disposed of. The regulations also establish standards for design and performance to be followed in the packaging, transportation, treatment, storage and disposal of hazardous waste. And, of particular importance to the subject of liability for injuries, treatment, storage and disposal facilities are required to carry liability insurance of at least $1,000,000 per incident and $2,000,000 annual aggregate for sudden occurrences, and $3,000,000 per incident and $6,000,000 annual aggregate for non-sudden occurrences.

Despite the safeguards provided by the regulatory program, there is still general public skepticism concerning the safeness of hazardous waste management facilities - a skepticism that crystalizes into awesome resistance in any local area where a facility is proposed. Such resistance has thwarted establishment of many needed facilities nationally, and has been equally as apparent in North Carolina in the vehement local opposition to treatment facilities proposed in Mecklenburg and Guilford counties, and to landfill facilities proposed in Warren and Anson counties.

Yet these facilities are needed. As the General Assembly declared in the Waste Management Act of 1981, the safe management of hazardous wastes, and particularly the timely establishment of adequate facilities for the disposal and management of hazardous wastes are essential to the economic growth and to the public health and safety in North Carolina.

In its deliberations concerning liability issues related to hazardous waste, the Board was compelled by the belief that one of the most important considerations in public acceptance of the necessary waste management facilities in North Carolina is the assurance that persons harmed by the generation, transportation, storage, treatment, and disposal of hazardous waste will be fairly compensated. This realization is supplemented by the conviction that it is more just that the cost of injuries caused by hazardous waste be borne by the handler of the waste rather than the injured person. The costs of compensating for such injuries can be passed on by the handler and reflected in the cost of the service or product he provides. However, it is important that there be some limits to liability; otherwise necessary waste management activities would become uninsurable or, at the very least, the cost of liability insurance would be prohibitively high.

Under the present common law, recovery for injuries caused by hazardous wastes is very difficult for several reasons. The effects of hazardous waste on people and the environment are often subtle and may be delayed for many years. This long latency period makes it difficult for an injured person to trace the cause of the injury, and indeed often acts as an absolute bar to recovery if the statute of limitations has run or the potential defendant has vanished.

The effects of hazardous chemicals are often uncertain and affected by many factors and intervening causes. Proving that a waste caused a particular injury is a highly technical matter requiring expert witnesses and other very expensive technical assistance. Requiring an injured person to prove that the waste was handled negligently as a prerequisite to recovery creates additional difficulty and expense. Indeed, proof of negligence may be impossible when the dangers of the waste are unknown, or when the waste combines with other substances or circumstances to cause injury. In either case the particular injury may be considered unforseeable so that the injured party would be denied compensation. The effect of these difficulties and expenses is that some claims, particularly smaller ones, go uncompensated, often because they are too expensive to pursue.

The justness and political necessity of assuring fair compensation for injuries, combined with the barriers to such compensation under existing tort law, convinced the Board that certain liability reforms should be made by statute. Although case law may be moving in the direction of some of the needed reforms, the progress is uneven and unpredictable. Statutory reforms can add predictability to liability decisions which should be to the advantage of hazardous waste handlers and their insurers, as well as injured persons.

In recommending these reforms, the Board realizes that the existing RCRA definition of regulated hazardous waste may be overly broad and includes some wastes that may not be hazardous enough to justify the recommended liability reforms. Nevertheless, in an effort to ensure a liability system that blends with and complements the ongoing regulatory program, it is recommended that hazardous waste be defined as it is under the state RCRA program. Use of this definition ensures that hazardous waste generators, transporters, treaters, storers and disposers will be easily identifiable and on notice that they are subject to any recommended statutory reforms enacted by the General Assembly.

III. Recommendations

A. Application of Strict Liability for Injuries Caused by Hazardous Waste

RECOMMENDATION 1 -- The Board recommends that strict liability be applied by statute to any generator, transporter, treater, storer, or disposer of hazardous waste in control of the waste at the time it causes injury to a claimant, and that strict liability on the part of a generator continue while the waste is transported and until it is accepted by a properly licensed treatment, storage, or disposal facility.

There seems to be a growing consensus that the common law tort system, based on negligence, fails in ensuring that meritorious small and multiple claims for damage are compensated. This is especially true in highly technical areas such as "toxic torts." The reason for this failure is the high cost of litigation necessary in order to prove negligence, such as expensive expert witnesses and high legal fees for protracted negotiation and litigation. These high "transactional costs" have resulted in a burden on the court

system, higher insurance costs, and a reduced percentage of the recovery going to the injured party. Strict liability is seen as a way to reduce these costs and to ensure that injuries are compensated by removing the barrier to plaintiffs of having to prove negligence.

Indeed, common law has long acknowledged that certain activities are so hazardous that no degree of care on the part of the actor is adequate to prevent possible injuries. Persons who engage in such activities are held strictly liable for injuries they cause, and the injured party therefore is not required to prove negligence to be compensated.

Opponents of strict liability claim that it is unfair to hold a person responsible for damages when that person has conducted his activities (in this case, the handling of hazardous waste) in a safe, non-negligent manner. They contend that such an approach will discourage useful economic activity or, at the very least, raise insurance costs substantially. The response to these objections is generally that it is more unfair to leave an injured person uncompensated, and that higher insurance costs will be reflected in an increased cost of conducting the activity -- a cost that reflects the true social costs of the activity.

The range of activities to which strict liability should apply was an important issue for the Board to decide. For regulatory purposes, hazardous waste handling activities are divided into generation, transportation, treatment, storage or disposal. The most comprehensive alternative is to impose strict liability for all of those activities. The RCRA regulatory program, however, distinguishes between hazardous waste generators and hazardous waste

management facilities, i.e., treatment, storage and disposal facilities. Generators are not as strictly regulated and are not required to carry liability insurance. Treatment, storage and disposal facilities are heavily regulated because the constant presence of large volumes of waste presumably increases the risk they pose, whereas generators must remove any waste they generate within 90 days. It is particularly important to note that treatment, storage and disposal facilities are required to carry liability insurance in the amounts mentioned on page 4 of this report.

In North Carolina, there are approximately 700 large generators of hazardous waste and many more small generators. There are approximately 250 hazardous waste management facilities, over 225 of which are also generators.

Numerous transporters are involved in transporting hazardous waste. Transporting waste probably exposes more people to risk than any other aspect of handling, although statistics show that accidents are rare. While hazardous waste transporters are subject to relatively strict regulatory requirements imposed both by the Environmental Protection Agency and the Department of Transportation, these requirements do not include mandatory liability insurance. Transporters typically require that shippers or receivers indemnify them for accidents occurring during transport resulting from the hazardous nature of the material transported.

Another key issue is the apportionment of liability among the various activities involved in handling hazardous waste. Existing North Carolina law imposes joint and several liability on defendants whose conduct combines to cause an indivisible injury. Under joint

and several liability, a single defendant who makes a substantial contribution to the damage is liable for the entire amount of damages. In order to get complete compensation, a plaintiff has to find and prove liability on the part of only one defendant. That defendant, upon payment of the plaintiff's claim, may seek contribution from any other responsible parties.

Joint and several liability is subject to two related criticisms in the hazardous waste context. One is that it is unjust to hold a person who handles a waste liable for any and all damages when he may have acted more carefully than the other parties involved. The other is that insurance costs will become extremely high if every party in the chain of handling the waste has potential liability for all damages, especially if a strict liability standard is in effect.

The Board's recommendation reflects its conclusion that strict liability will help ensure that one of the barriers to meritorious claims, particularly smaller claims, is removed. Strict liability should also cause handlers of hazardous waste to use the greatest possible care to employ practices that minimize the risk of injury.

Continuing generator liability through the transport stage, a limited application of joint and several liability, helps prevent large claims for damages caused by waste in transport from going uncompensated because the transporter, who is not required to carry a certain minimum amount of liability insurance, has inadequate assets or insurance. On the other hand, under the recommended approach, a generator's strict liability does not continue indefinitely because it is terminated when the waste is accepted at a permitted and

regulated treatment, storage, or disposal facility. Unlike transporters, facility operators are required under RCRA to carry liability insurance, and it is therefore less likely that they will be unable to compensate for damages.

Under the recommendation, apportionment of damages where strict liability is imposed would be as follows: a person injured by a waste under control of a generator would seek recovery only from the generator under a standard of strict liability; a person injured by waste in the transport stage could seek recovery from the transporter in control of the waste at the time it caused the injury, from the generator, or from both because they would be jointly and severally liable under a standard of strict liability; a person injured by waste at a treatment, storage, or disposal facility could seek recovery only against the owner or operator of the facility under a standard of strict liability.

The recommendation can be implemented by providing by statute that the person in control of a waste shall be strictly liable for damages caused by that waste; and furthermore, a generator of a hazardous waste shall be strictly liable for any damages caused by that waste, except that it shall be an absolute defense if the generator can show that the waste has been properly delivered to and accepted by a treatment, storage and disposal facility properly permitted to receive the waste.

The recommendation blends well with the regulatory program which, among other things, requires that a generator prepare and keep a written "manifest" for any waste shipped by him. The statute could provide that the manifest gives rise to a presumption that the waste

was shipped to and accepted by a permitted facility. This presumption would encourage generators to comply with the manifest system.

RECOMMENDATION 2 -- The Board recommends that strict liability apply only to active facilities and ongoing activities.

Although inactive facilities and abandoned sites have substantial potential to cause injuries, a statutory framework already exists at both the federal level (the so-called "Superfund" law) and the state level (the Oil and Hazardous Substances Pollution Control Act) to deal with these spills. Both laws authorize a fund to be used to clean up spills and restore damaged resources. The State statute also establishes a standard of no-fault (strict) liability for damages to persons or property resulting from a discharge into state waters, which would apply in many cases involving damages due to discharges from abandoned sites. While the present Superfund framework does not provide for recovery of personal injury or private property damages, Congress will consider next year a victim compensation scheme recommended by the study group established by Section 301(e) of that law.

The Board was also concerned that imposing strict liability for past acts raises potential constitutional problems and that insurance policies generally covering those acts might not apply to liability that did not exist when the acts took place.

The recommendation reflects the Board's conclusion that existing statutes requiring responsible parties to clean up inactive facilities should be given a chance to succeed in minimizing

potential injuries. It is at best harsh, and at worst unconstitutional, to apply statutorily a standard of strict liability for injuries caused by past acts. In such cases the appropriate common law standard should apply.

RECOMMENDATION 3 -- The Board recommends that strict liability apply only for injuries resulting from risks associated with the characteristics that make the waste hazardous.

There is no justification for applying strict liability for injuries caused by the normal activities of a hazardous waste handler if those injuries are not caused by the waste itself. It is, after all, the hazardous nature of the waste that justifies application of strict liability.

The following is a somewhat exaggerated application of this recommendation. A worker at a hazardous waste facility runs over a drum lying near the property boundary and sends some fragments of metal flying that injure a bystander. This injury results from an activity associated with hazardous waste management, but does not relate to the characteristics that make the waste hazardous, and therefore, strict liability would not be imposed. However, if it were a corrosive hazardous waste that squirted from the drum and burned the bystander, the injury would result from the hazardous characteristic of the waste, and strict liability would be imposed.

RECOMMENDATION 4 -- The Board recommends that a handler of hazardous waste be held strictly liable for all injuries caused by the waste, regardless of whether he knew at the time of injury that the waste could cause that particular type of injury.

The view that liability should exist for all injuries caused by the waste is supported by the argument that it is better that the person that causes the injury pay for it than the innocent victim. On the other hand, the deterrent value of such a policy is questionable because a person can only take precautions against unknown risks by not acting at all. Such forbearance of action can certainly slow economic and technological progress.

The recommendation is consistent with the goal of emphasizing compensation regardless of fault. The Board emphasizes that this does not mean that strict liability will be applied retroactively in the case of a waste that was not considered hazardous at the time of the act that caused the injury. It only applied to an unknown effect from a waste known to be hazardous at the time it causes the injury.

RECOMMENDATION 5 -- The Board recommends that strict liability apply to successors in interest as well as to the generator, transporter, treater, storer or disposer in control of the waste at the time it causes the injury.

To impose liability to successors in interest has the effect of increasing the parties from whom compensation might be sought, thus increasing the possibility that an injured person will be compensated. The former owner of a facility, for instance, should not, by selling the property, be able to relieve himself of liability for injuries caused by conditions he created.

This recommendation would help avoid cases where an injured person is unable to recover damages because the company that created the hazard has passed out of existence or sold a site with a latent hazardous waste problem to another person. In such cases, the new

owner may be the only person able to compensate the injured person. Owners of facilities are required to record on the deed that the site has been used as a hazardous waste facility. Therefore, subsequent purchasers should be on notice and have full opportunity to assess the risks they may be acquiring.

RECOMMENDATION 6 -- The Board recommends that punitive damages not be allowed for claims where strict liability is applied.

Damages in tort claims can be generally categorized as compensatory damages such as medical bills, lost property value, lost wages, pain and suffering, mental anguish or similar intangible injuries; and punitive or exemplary damages. The first category focuses on compensating the injured person, but the second focuses on punishing the liable person. Punitive damages are awarded only if the defendant's conduct which causes the damage is intentional, reckless, or in wanton disregard of the safety of others.

The justification for punitive damages is questionable for activities such as waste management that are regulated by a comprehensive statutory scheme which includes criminal and civil penalties for violations of such regulations. Such regulations set the standards for the regulated activities, and the statutory penalties should be considered the exclusive means for punishing violators.

Another reason for not allowing punitive damages is that large punitive damage awards made to initial claimants may leave inadequate funds (or insurance) to compensate others who are injured. Such a possibility becomes more likely when multiple claims

arise from the same action. The resulting exhaustion of funds is incompatible with the goal of ensuring that as many injured parties as possible are compensated for their actual injuries.

On the other hand, it is argued that regulatory programs generally are not adequately enforced and penalties are not large enough to deter reprehensible waste management practices, and therefore, the threat of punitive damages is a necessary additional deterrent. However, citizen suit provisions under federal and state statutes permit private initiation of enforcement activities in some cases.

The Board concluded that disallowing punitive damages is consistent with the goal of compensating claimants for injuries without consideration of fault on the part of the defendant, and may help avoid extremely large recoveries based on punitive damages that render a defendant financially unable to compensate other injured persons. Sufficient remedies are provided by state and federal statutes in the form of criminal and administrative penalties for violations by hazardous waste handlers.

RECOMMENDATION 7 -- The Board recommends that although strict liability is imposed, contributory negligence of a claimant will bar any recovery by that claimant.

Under negligence law, a claimant cannot recover damages if his own negligent acts contribute to his injury. However, where strict liability is imposed, recovery is not prevented by ordinary contributory negligence, but will be prevented if the claimant voluntarily and knowingly exposed himself to the risk. The Board concluded that an injured person should not be able to recover, even

where strict liability is imposed, if his own negligent acts are an essential cause of the injury.

B. Statute of Limitations

RECOMMENDATION 8 -- The Board recommends that the statute of limitations begin to run only when the injury becomes apparent or ought to become apparent to an injured person, and that the ten-year statute of repose not apply.

The purposes of statutes of limitations are practical ones: (1) to ensure that legal actions are not initiated so long after the time of the acts alleged to have caused the damage that the facts necessary to litigating the matter have "grown cold" (i.e., are no longer capable of accurate determination), and (2) to ensure that persons are not subjected indefinitely to the threat of liability for past actions.

When strict liability is applied, the first reason becomes less important because there is no need to recall facts relevant to whether the defendant's acts were negligent. The main issue of fact becomes whether the hazardous waste under the control of the defendant caused the injury, an issue based more on scientific data than on facts relating to the defendant's actions. Furthermore, statutes of limitations have no deterrent value and in the case of injuries with long latency periods, they provide a shield for waste handlers.

Commencement of the running of the statute of limitations at the time of the defendant's act can be an unfair barrier to recovery for injuries caused by hazardous wastes. Many of the effects of chemical wastes may not manifest themselves for many years. This same problem

exists in relation to many other types of injuries in our society today. The fairness of statutes of limitation that run from the time of the act of the defendant has been challenged and most states have statutes that run from the time of "discovery" of the injury by the injured party.

North Carolina's statute [N.C.G.S. 1-52(16)] presently provides that an action must be brought within 3 years "from the time that the injury or damage becomes apparent or ought reasonably to have become apparent to the claimant," but then provides an absolute bar, known as a statute of repose, against any action brought "more than 10 years from the last act or omission of the defendant giving rise to the cause of action." Thus, in North Carolina an injured party has three years after the discovery of the injury in which to initiate an action for recovery; however, no action may be brought after ten years under any circumstances.

The goal of facilitating compensation of injured persons outweighs the practical advantages of putting potential legal actions to rest after a certain period of time. This is especially important in cases where the condition causing the damage may develop very slowly (for example, a buried toxic waste may take many years to reach adjacent water supplies) and where the injury from the condition may not manifest itself for many more years.

C. Causation and Related Evidentiary Requirements

RECOMMENDATION 9 -- The Board recommends that there be no attempt to ease the plaintiff's burden of proving that the injury or damage was caused by the hazardous waste handling activity of the defendant.

As the law presently stands, a plaintiff must prove in each case that there is a causal connection between the disease or injury complained of and the hazardous waste related activity of the defendant. Proof of this causal connection is usually difficult in these cases for several reasons.

First, a plaintiff must show the nature of the exposure - whether by inhalation, ingestion or other contact - in order to show the duration, frequency and intensity of exposure. If exposure is adequately proven, proof of causation will usually require large amounts of sophisticated and thus very expensive, medical and scientific testimony to demonstrate the epidemiologic or statistical correlation between the hazardous waste(s) in question and the injury or disease.

Additional problems of proof stem from the fact that there is often a long latency period before effects of exposure become obvious, and during that period the injured party may have been exposed to a wide variety of substances from other sources. Furthermore, a facility alleged to cause the injury may have handled many types of waste which may interact to cause effects that none of them would cause alone, making it more difficult to determine the exact cause of the injury.

Finally, medical science has simply not been able to determine the effects of many chemicals already on the market and, of course, even less will be known at any given time concerning the effects of new chemicals that enter the market constantly.

The difficulties in proving causation have been eased in Workers Compensation Laws by a "rebuttable presumption" approach.

Under this approach, if the plaintiff can prove that he suffers from certain types of injuries and that he has had a certain amount of exposure to the substance in question that is known to cause those injuries, the burden shifts to the defendant to prove that the substances within his control did not cause the injury.

This "rebuttable presumption" approach is considered fair because a substantial body of information exists concerning certain substances (for example, asbestos) to show a strong statistical correlation between exposure to the substance and the subsequent development of certain diseases [for example, in the case of asbestos, mesothelioma (lung cancer)]. This is particularly valid and useful in worker's compensation cases because employees are exposed day-in and day-out to a known set of substances.

However, in the case of injuries allegedly stemming from hazardous wastes, the plaintiff will less often be subject to constant exposure over a long period of time and the exposure is likely to be to a greater variety of substances or, for that matter, many unknown substances. This should become even more the case now that strict regulatory programs are in effect which tend to isolate the waste in closely controlled facilities. Thus a presumption of causation in the case of alleged injuries from hazardous waste is probably not as valid or fair as in workplace injury cases. Even in the workplace injury context, however, there have been abuses. For example, Congress in 1981, felt it necessary to abolish several statutory "rebuttable presumptions" in the Black Lung Benefits program because many successful claimants under the program did not have adequate medical evidence of black lung disease.

There is at present insufficient indication that there will be a large number of cases alleging injuries from similar types of wastes, which is the circumstance that justifies a presumption of causation. At present, it seems likely that claims for injuries will involve a wide variety of wastes, and that causation must be verified on a case-by-case basis.

D. Administrative Mechanisms for Determining Liability and Compensating Injured Persons

RECOMMENDATION 10 - The Board does not recommend at this time that an administrative agency be created to adjudicate strict liability in hazardous waste cases.

There are two key factors to consider in deciding whether an agency rather than the courts should adjudicate liability. (1) Will there be enough claims to justify establishing a separate system? and (2) Are the cases likely to be so complicated that special judges or panels are needed to resolve them?

Concerning the first question, there is little actual proof yet that there will be a great increase in toxic tort cases, although it is logical to assume that there will be at least some increase due to the proliferation of chemicals in the last 20-25 years and the typically long time it takes to discover an effect. Furthermore, the implementation of a very stringent regulatory program should reduce the potential for injuries. At this point it seems premature to assume that the case load will justify a separate system.

Concerning the second question, the complexity of these cases will certainly be reduced if strict liability is applied, although the remaining issues of causation are highly technical and the use of

administrative law judges with particular expertise might promote more consistent decisions.

The Board concluded that it is premature at this time to assume that the volume or complexity of hazardous waste liability cases will be so great that the general court system cannot handle them adequately.

RECOMMENDATION 11 - The Board does not recommend at this time that a fund be established for compensating injured claimants.

The advantage of a fund is that it would ensure that the money is available to compensate a person with a meritorious claim, that the compensation could be immediate and that identification of a specific responsible party would not be necessary. However, the fact that most of the facilities are required to have liability insurance for precisely this purpose certainly reduces the need for a fund. Furthermore, use of a fund entails some administrative costs that will increase the "transactional" costs.

If compensation is made from a fund rather than by the responsible party, then compensation is divorced from responsibility and has no deterrent value unless the agency administering the fund is empowered to seek recovery from the reponsible person(s). Such a process has potential to increase even further the "transactional" costs. A fund would appear more appropriate in the abandoned or inactive site context, where the identity of a potentially responsible party may be unknown. This is the area Congress will be studying closely in connection with the report required by Section 301(e) of the federal Superfund law. California has adopted

an "orphan site" fund to compensate those injured by abandoned sites, but that state is apparently the only one which has found such a system necessary.

Furthermore, any attempt to establish a fund would entail difficult problems of deciding who should provide the money for the fund, whereas direct compensation by the responsible defendant places financial responsibility where it should be. Mandatory liability insurance requirements should be adequate to ensure that the defendant will be able to provide compensation in most cases.

APPENDIX E

LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA

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Statement to the Legislative Study Committee on Strict Liability, October 12, 1984 by Jan Ramquist

Thank you Senator Barnes and Representative Clark for the invitation to address this committee. My name Jan Ramquist, I serve as Vice President and Legislative Chair for the League of Women Voters of North Carolina. Our goal this session is to support legislation which will protect our environment insure safe treatment and handling of hazardous wastes and encourage sound fiscal policy to provide adequate monitoring of the hazardous substance and waste.

North Carolina has begun to confront its own hazardous waste with the passage of the Hazardous Waste Treatment Commission bill but other decisions must be faced. Handling hazardous substances and waste is a critical problem, at least 9000 North Carolina firms have been identified as possible hazardous waste generators. I have given you a list the of estimated hazardous waste generation by industry. You will notice some of the highest generators are industries prevalent in North Carolina. I point this out not to assign blame but to emphasize that hazardous substance and waste is a real and serious issue for North Carolina. We need to address it immediately. North Carolina is in EPA Region IV. Our regions has 1,769 transporters of hazardous waste, the second highest in the nation.[1] It is extremely important that North Carolina, the nation's 11th largest generator of hazardous waste, accept the responsibility to develop standards for the safe transportation and storage of hazardous substances and waste.

As you know in the past League has supported the strict liability bill. The intention of the bill is two-fold. It attempts to clarify

who is financially responsible for clean up, personal injury, and property damage of any accidents. It is important, that, the taxpayers do not hold that financial burden. The second goal is to encourage the safest possible handling of hazardous substances and waste. The public correctly expects the state and industry to protect public safety. Surveys have found that 27% of North Carolina's population would base their votes solely on environmental issues and 76% of those surveyed considered hazardous substances and waste to be a serious threat to drinking water supplies, the fishing industry, and public health.

This committee has the opportunity to improve the public trust regarding the state's and industries willingness to protect public health. There is great concern for innocent individuals injured as a result of the presence of hazardous waste. The bill should hold generators, transporters, and storers of hazardous waste "jointly, severally, and strictly liable. Strict liability means liability for personal injuries or property damages without regard to the defendant's negligence or fault. For example, a car traveling along an interstate blows a tire. The car swerves out of control into the path of a truck and the vehicles collide. The truck overturns; its tank ruptures, releasing a hazardous waste. The spilled chemical burst into flames and several residents are hospitalized with respiratory ailments related to the toxic fumes. A local water supply is also contaminated. The truck did not cause the accident, but the accident was made more severe because of the hazardous waste it carried. In many cases the state has paid for clean-ups of spills and accidents. This bill would make the presence of the hazardous waste and the resulting damages from

the occurrence the responsibility of the generator and anyone in control of the material at the time.

The intention is not to assign blame but to provide for the expenses incurred by accidents. This is a legitimate expense of doing business. This liability would encourage the best possible handling of hazardous waste and decrease the number of innocent victims of poor management. This bill would encourage the generators to exercise care in selecting transporters, treaters and storer. Reputable, dependable companies would be selected more frequently and "fly-by-night" operators would no longer be viable in the marketplace. It would greatly reduce the likelihood of the state being forced to pick up the tab for the clean-up of an accidental or intentional hazardous waste spill such as the PCB roadside spills of a few years ago.

Without strict liability, persons with injuries or damages would have to seek redress under common law, a process which can be time-consuming and prohibitively expensive for most individuals. It is extremely difficult for the plaintiffs to establish that the defendant behaved "unreasonably." Victims will initiate legal action only when there is clear indication that the damage award will exceed the time, effort and actual expenses of bring suit. Many valid claims are therefore not initiated.[2] Leaving the burden of proof on the injured party is an unfair expensive burden. The General Assembly should establish a clear policy. If left to the courts the standards will continue to vary. By passing a strict liability bill business will be given clear consistent standards.

Using House Bill 738 as a model would be a good starting place.

In that model, the following cases would NOT fall under strict liability: when the injured party had knowledge of the danger and voluntarily and unreasonable encountered the danger; and when the hazardous waste occurrence was cause solely by: an act of God; an act of war.

The Strict Liability bill alone is not going to address the problems, there are several components and possible avenues to achieve comprehensive hazardous substance and waste management. In addition to legal protections, there must also be adequate funds for monitoring, enforcement, and a built up fund available to clean up dumps and pollution which are the legacy of poor management of the past.

It is appropriate for this committee to address a problem which has been ignored by RCRA and is a "responsibility issue". Abandoned sites or closed facility where hazardous waste have been handled in the past is supposed to be address in the federal "Superfund" legislation. Unfortunately, Congress has declined to require an adequate level of funds. The Superfund is currently funded 87.5% by generators and 12.5% taxpayers. Remediation or cleaning up have high price tags. The Superfund need assessment estimates a cost between $8 and $16 billion to clean up 2000 identified sites, only $1.6 billion has be allocated. 2000 sites is not the final total, there are more sites being identified daily. After several years of the practice of landfilling, the nation is discovering that most, maybe all landfills eventually leak. EPA chief William Ruckelshaus said "It is probably impossible to construct a landfill that won't have a leak." North Carolina has hundreds of landfills, many abandoned, which are candidates for future

problems.

The clean up costs doesn't begin to address the cost of medical care. I have provided a sheet of substances which are commonly found in groundwater, their acute, chronic, and reproductive effects. The Office of Technology Assessment estimates 275 million metric tons of hazardous waste is generated annually with 80% deposited on land. "OTA cautions, long-term health effects from exposure to hazardous waste are uncertain, but they may be serious."[2]

It would be a mark of fiscal responsibility for North Carolina to identify funding sources now so when clean up must occur a lack of funds doesn't jeopardize public safety. Several governments have responded to the cost of the hazards substance and waste by assessing the users of the hazardous substances. The cost of handling, liability, and safe management of hazardous substances and waste are all legitimate business expenses, which should be paid by business and reflected in the cost of goods and services.

A state owned, privately operated landfill in Nevada has an inspector at the landfill. The inspector checks for proper packaging of hazardous waste. The program is funded through a user fee. Both South Carolina and New York have on site inspection programs funded by users of hazardous waste facilities.

The U.S. business community have indicated interested Japan and its business policies which have been so successful. It is interesting to look to Japan on this particular issue for two reasons, their source of revenues and their method of dealing with compensation to victims. Since 1973 Japan has had a law for Compensation of Pollution-Related

Health Damage. One key innovation is financial compensation revenues through levies on polluters. The general revenues are obtained from an emissions charge on stationary sources and a tonnage tax on vehicles. If a specific polluter is identified the full cost is paid to the victim groups. Between 1973 and 1978, $1 billion was collected to compensate 58,000 victims. There is not a large litigation cost under this bill. However, some of the uncertainty of relating disease to pollution causes some problem in implementing the program.[4] League recommends consideration of a generator's fee or a similar revenue source. The fee would ultimately be paid by those people who derive the benefits from the particular product or service. The "real cost" of products include handling of hazards associated with the production of products.

Remedial programs already discussed are very important, but prevention measured in dollars and human suffering is clearly preferable to remediation. The need for increased funds to hire and retain more trained engineers in the Department of Human Resources must be examined. The agency has the important responsibility of monitoring hazardous waste from generation to storage. The salaries should be at a level high enough to retain the best engineers since they are directly responsible for North Carolina's public health. Our monitoring program is one first line of defense against accidents and need for liability claims. Another first line of defense is the Right to Know legislation currently being discussed in another committee. If workers, the community, and emergency personnel know what chemicals are presence, accidents and the need for liability may be avoided.

League supports Strict Liability and Right to Know accompanied by adequate funds for inspections and clean up of inactive sites. Laws are not effective without adequate funds to enforce them.

Footnotes

1. U.S.EPA Data Management Systems, 1980.

2. Jeffrey Trauberman. "Statutory Reform of "Toxic Torts": Relieving Legal, Scientific, and Economic Burdens on the Chemical Victim." Harvard Environmental Law Review, v. 7, no.2, 1983 p.184-206

3. "Chemical and Engineering News, American Chemical Society, V. 60, Mar. 28, 1982:11-20.

4. John E. Blodgett. Ch. 13 U.S. Library of Congress. Congressional Research Service. Compensation for Victims of Water Pollution. Washington, U.S. Government. Printing Office, 1979. p. 372.

Table 1. Reported Effects of Commonly-Found Contaminants in Groundwater (not necessarily effects from drinking)

Substance	Acute Effects	Chronic Effects	Carcinogenicity Mutagenicity Reproductive Effects
Organics:			
Benzene	death; nausea, giddiness, headache, unconsciousness, convulsions, paralysis	thrombocytopenia, leukopenia, myelocytic anemia, leukemia (cumulative)	leukemia
Benzene hexachloride (mixture of isomers) (BHC) (including Lindane)	(hyperirritability, convulsions, incoordination)*	chronic liver damage; aplastic anemia; (nervous symptoms, degeneration of liver and kidney)	leukemia? (carcinogenic in mice and rats)
Bromoform	No data on effects on humans		
	(liver and kidney effects)	(disorders in prothrombin synthesis and glycogenesis in liver, reduced renal filtration)	weakly positive in *Salmonella* test for mutagenicity
Carbon tetrachloride	death, liver damage, kidney shutdown, heart failure, centrilobular necrosis	gastrointestinal nausea, vomiting, nervous system, headache, drowsiness, fatigue, apathy, mental confusion, weight loss	carcinogen, teratogen
Chloroform	Primarily affects the liver, also kidney and heart, skin reaction	reversible toxicity to liver	(probably carcinogenic in mice and rats)
Di butyl-phthalate (DBP)	nausea giddiness eyes inflamed, toxic nephritis, blood in urine		(birth defects, reproductive disturbances)
1,2-Dichloroethane	death, irritation of eyes, nose, throat, central nervous system depression, injury to liver, kidneys, adrenals	(liver and kidney damage)	weak mutagen

Table 1. (continued)
Reported Effects of Commonly-Found Contaminants in Groundwater

Substance	Acute Effects	Chronic Effects	Carcinogenicity Mutagenicity Reproductive Effects
Organics:			
Methyl chloride	(death)	(neuromuscular effects, decreased survival, anemia; reticulocytosis; nervous system and eye effects)	no data
Methylene chloride		(slight weight reduction, some liver injury)	limited data, may be carcinogen
Parathion	death, depression of cholinesterase		mutagen
Tetrachloroethylene	central nervous system effects		limited data
Toluene	narcotic effect	mild red cell decrease; enlarged liver; (nervous system intoxication, incoordination)	
1,1,2-Trichloroethane	(liver and kidney effects)		(possibly carcinogenic)
Trichloroethylene	central nervous system depression, incoordination, unconsciousness; nausea, vomiting, blurred vision, death permanent impairment of mobility	(increased liver and kidney weights)	(carcinogenic in mice)
Vinyl chloride	central nervous system dysfunction, sympathetic sensory polyneuritis, organic disorders of brain	skin alterations, Reynaud's syndrome, acroosteolysis, lesions of skin, bones, liver, spleen, lungs	carcinogen, angiosarcoma (mutagen, cancer in rats)

Table 1. (continued)
Reported Effects of Commonly-Found Contaminants in Groundwater

Substance	Acute Effects	Chronic Effects	Carcinogenicity Mutagenicity Reproductive Effects
Organics.			
Xylene	death, confusion, renal impairment, liver damage	skin irritation; uncoordination, decreased white blood cells, hyperplastic bone marrow and spleen; kidney congestion	(developmental defects in chicken embryos)
Inorganics:			
Arsenic	death abdominal pain, vomiting, cramps, spasms, restlessness, etc.	cumulative toxin, skin reactions, vomiting, diarrhea, conjuctivitis, laryngitis, bronchitis, neurological symptoms, muscle tenderness, congestive heart failure, possibly suppresses some immune responses, etc	carcinogenic, mutagenic (birth defects in mice and hamsters)
Cadmium	gastrointestinal upsets	cumulative toxin; bronchitis, emphysema, anemia, kidney stones, (hypertension)	may be carcinogenic (carcinogenic, teratogenic, testicular and ovarian necrosis in rats)
Chromium	tubular necrosis of kidney	cumulative toxin, hemorrhage of gastrointestinal tract, ulceration	carcinogenic
Lead		cumulative toxin, disturbances of hemapoietic system, central and peripheral nervous system, kidneys, mental defects in children	(carcinogenic in rats, mutagenic, teratogenic) effects on sperm production

Table 1. (continued)
Reported Effects of Commonly-Found Contaminants in Groundwater

Substance	Acute Effects	Chronic Effects	Carcinogenicity Mutagenicity Reproductive Effects
Inorganics:			
Mercury		cumulative toxin; kidney damage, intestinal hemorrhage, ulceration; mental disturbance; ataxia, disturbance of gait, speech, hearing, chewing and swallowing, constriction of visual field, etc. – "Minamata disease"	birth defects

NOTES

"Entries in parentheses are derived from animal data

This table is based on health data surveyed in *Drinking Water and Health* by the Safe Drinking Water Committee of the National Research Council (NRC – National Academy of Sciences, 1977) with very limited supplementation from Dodge *et al* ("A Brief Review of Selected Environmental Contamination Incidents With a Potential for Health Effects") and Irving Sax, (*Dangerous Properties of Industrial Materials*, 1979, Van Nostrand-Reinhold). The purpose of this list is not to give usable toxicological information (that would require reference to dosage, route of administration, and many more details than can be described here), but merely to illustrate the wide and serious range of effects known to be caused by the same chemicals found in drinking water.

The organic chemicals listed represent the overlap between the CEQ's list of synthetic organic contaminants most frequently found in drinking wells reported in *Contamination of Groundwater by Toxic Organic Chemicals* (1981), and the compounds listed in *Drinking Water and Health*. In addition, we have included five of the most dangerous inorganic elements.

A final caution is that even less is known about the effects of the complex mixtures of poisons that actually occur in groundwater (though a few were surveyed by the Surgeon General in *Health Effects of Toxic Pollution*). Many of the true interactions are not known, but it seems a safe guess that in some cases the mixtures will produce augmented synergistic effects greater than would be expected from simply adding the effects of the individual substances.

XI. Hazardous Waste

(Source: Solid Waste Data - A Compilation of Statistics on Solid Waste Management Within the United States, Washington, D.C., U.S. Environmental Protection Agency, 1981; pp. 61-66.)

XI-1 ESTIMATED HAZARDOUS WASTE GENERATION BY INDUSTRY, 1980

SIC Code	Industry	Quantity (wet kkg)	Percent
22	Textile Mill Products	203,000	0.5
24	Lumber and Wood Products	87,000	0.2
25	Furniture and Fixtures	36,000	0.09
26	Paper and Allied Products	1,295,000	3.1
27	Printing and Publishing	154,000	0.4
28	Chemicals and Allied Products	25,509,000	61.9
29	Petroleum and Coal Products	2,119,000	5.1
30	Rubber and Misc. Plastic Products	249,000	0.6
31	Leather and Leather Tanning	474,000	1.1
32	Stone, Clay and Glass Products	17,000	0.04
33	Primary Metal Industries	4,061,000	9.8
34	Fabricated Metal Products	1,997,000	4.8
35	Machinery, Except Electrical	322,000	0.8
36	Electrical and Electronic Equipment	1,093,000	2.7
37	Transportation Equipment	1,240,000	3.0
38	Instruments and Related Products	90,000	0.2
39	Misc. Manufacturing Industries	314,000	0.8
--	Non-Manufacturing Industries[1]	1,971,000	4.8
TOTAL		41,235,000	99.9[2]

Data compiled by JRB Associates.

[1] SIC 5085-Drum Reconditioners, SIC 07-Agricultural Services, SIC 5181-Chemical Warehouses, SIC 40-Railroad Transportation, SIC 55-Automotive Dealers and Gasoline Service Stations, SIC 72-Personal Services, SIC 73-Business Services, SIC 76-Misc. Repair Services, SIC 80-Health Services, SIC 82-Educational Services.

[2] Does not total 100% due to rounding error

Source: USEPA Hazardous Waste Generation and Commercial Hazardous Waste Management Capacity: An Assessment, SW-894. Prepared by Booz, Allen, and Hamilton, Putnam, Hayes, and Barclett, Inc.; Washington, D.C., 1980.

XI-2 INDUSTRIAL HAZARDOUS WASTE GENERATION BY REGION, 1980

EPA Region	Quantity (wet kkg)	Percent

APPENDIX F

Statement

of

J. E. Harwood

N. C. Citizens for Business and Industry

before the

N. C. Legislative Research Commission

on

Strict Liability

October 12, 1984

Raleigh, N. C.

Good morning, I am Joe Harwood, representing the NC Citizens for Business & Industry which has more than 1,700 members in this State. I serve as chairman of the Environmental Concerns Committee of that organization.

From a philosophical and a practical sense, NC Citizens for Business and Industry is opposed to the concept of strict liability as embodied in legislation like HB 738.

The reasons for our opposition follow:

1. Hazardous and toxic wastes are an inherent by-product of daily household living and industrial processing. Many things that are classed hazardous by governmental regulations are not in fact harmful. Therefore, the concept of strict liability as applied to hazardous waste is fundamentally unfair and unjust. Strict liability means liability for payment of money, without regard to fault or negligence. That is a marked departure from present tort law in which liability is established on a departure from a "reasonable standard of care" where this departure has caused some problem for someone else. Flying airplanes was once considered so dangerous that it was an activity subject to strict liability, however, with time this designation has disappeared from laws and court decisions. Historically, courts have been extremely reluctant to apply or to extend the concept of strict liability, however, there have been moves in some state legislatures to make companies strictly liable for hazardous wastes and hazardous waste management activites. When members of any General Assembly are asked to adopt strict liability for hazardous waste management and ultimately remove these considerations from the courts (where they have resided for centuries), and also eliminate the flexibility and gradual evolution that are characteristics of case law (not statutory law), extreme caution should be

exercised with full consideration of all the potential consequences. To this end, the Citizens for Business and Industry sees no reason to abandon present tort laws governing liability of hazardous waste management.

2. HB 738 makes generators, treaters, storers and disposers of hazardous waste, who are already regulated under a myriad of state and federal laws and regulations on the subject of hazardous waste management, strictly liable for bodily injury and property damage caused by those wastes when under their control, and generators strictly liable even when the wastes are not under their control. Under present law, a generator has to have hazardous waste hauled by a carrier permitted by the state and insured. To illustrate the unjust nature of this approach, a few weeks ago in Charlotte a robber, fleeing from police at high speed ran into a gasoline tanker on Highway 74. Under HB 738 as presently written, had that tanker been filled with hazardous waste, both the trucker and the generator would have been jointly and severally liable to the robber injured by the waste, even though the robber caused the accident. Extending current law to cover this type situation is totally unfair.

3. There is no limit on the amount of damage that can be awarded under HB 738 except in the situation where the state is the defendant where limits are set under provisions of the NC Tort Claims Act, GS 143-291.

4. The statute of limitations for bringing suit is extended from 3 years to 30 years. This time extension is far too long.

5. The available defenses under HB 738 are few and extremely limited.

6. Passage of a strict liability law, such as HB 738 would impede the industrial development in North Carolina of specifically the so called clean

high technology industries as well as the more research oriented industries. A few states have passed strict liability laws regarding hazardous waste. Those laws have not been beneficial to those states, as Minnesota quickly learned. The Minnesota law is similar to HB 738. The result of the Minnesota law was that 27 industries could not purchase insurance to cover the new risks imposed by the law. One of Minnesota's oldest, home-grown industries, 3-M, announced plans to move its R&D and another operation division to Texas - with the ultimate loss of 1,500 jobs to Minnesota. Attached to my printed statement are two discussions of the Minnesota situation. (Also, I have attached a copy of a general article from Legislative Policy on Strict Liability.)

7. Many insurance companies have refused to insure under state strict liability laws. While one motivation for considering strict liability legislature may be to compel safe handling of hazardous waste, ironically, the inability to obtain insurance will drive responsible persons out of the waste management and transportation business. This is counter - productive to the safe management of hazardous waste.

8. Punitive damages should never be applied in the law except against persons who intend to harm someone, or act in such a willful, wanton or reckless manner that harm to someone is the probable consequence. Punitive damages have no place in ordinary management of hazardous waste.

In conclusion, the Citizens for Business and Industry is opposed to the concept of strict liability and we feel there is no reason to abandon present tort law governing liability of hazardous waste management.

Thank you for the opportunity to speak to you today.

Respectfully submitted,

J. E. Harwood
N. C. Citizens for Business and Industry

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MINNESOTA SUPERFUND AND VICTIM'S COMPENSATION LEGISLATION

High state taxes plus stringent environmental laws and regulations are among the actions that have led 3M to announce the move of some of its operations to Austin, Texas. This move includes the research and development division and an unnamed operation which the corporation plans to expand substantially. As a result of this move, Minnesota will loose 1500 jobs, present and future.

In response to 3M's plan, Governor Perpich said, "We are not accepting this (decision) as inevitable. The legislature and I are preparing to respond to 3M's concerns." Perpich has proposed repeal of the state's 10% income tax surcharge on July 1 and will offer several amendments to last year's Superfund law, according to press reports.

Previously, 3M has objected to Superfund provisions imposing strict and retroactive clean-up liability, as well as to the high cost of unemployment and workers' compensation and to stiff personal income taxes in Minnesota.

The 3M decision may have some political bearing on the victim's compensation issue. At last report, Senator Wegshiede has decided not to pursue his victim's compensation legislation this session. He will await the recommendations of the Study Commission on Victim's Compensation and will use this as the basis for developing legislation in 1985. Senator Wegschiede's victim's compensation legislation is closely tied to the retroactivity issue in Superfund. His bill would have modified the retroactivity provision in exchange for some form of victim's compensation.

PHILADELPHIA ORDINANCE #21 ON TRANSPORTATION OF HAZARDOUS MATERIALS

This ordinance, introduced on February 8, has been referred to the Committe on Commerce, Transportation, and Public Utilities. Ordinance #21 regulates the movement of hazardous materials in the city of Philadelphia. The ordinance requires persons transporting, generating, storing, and/or handling chemicals to obtain a Hazardous Chemicals license. It also requires posting chemical licenses in prominent locations accessible to inspectors from the fire department, the Department of Licenses and Inspections, and employees of the licensee. The licensee also has to maintain a material safety data sheet (MSDS) for each substance listed on the license application. The ordinance also amends and broadens existing community right to know regulations. For further information, contact Geoffrey Hurwitz, Rohm & Haas Company, 702-393-3200.

TENNESSEE UNITARY TAX

The Unitary Tax bill (HB 26 and SB 25) considered by the Special Session of the Tennessee General Assembly was heard in committee February 8 and postponed indefinitely. This kills Unitary Tax activity in Tennessee for this legislative session.

Hazardous Waste

CUTOFF OF INSURANCE BY LONDON-BASED FIRM INTENSIFIES DEBATE OVER MINNESOTA SUPERFUND

ST PAUL, Minn – (By a BNA Staff Correspondent) — An announcement by a London-based insurance company that it will no longer provide environmental impairment liability insurance in Minnesota is intensifying the controversy over the medical causation and retroactive liability clauses of Minnesota's year-old superfund law

The Minnesota Environmental Response and Liability Act was approved in April 1983 following three years of extensive legislative debate (Current Developments, May 27, 1983, p 142).

Although opponents and proponents of the measure supported the site cleanup provisions of the law, the sections relating to liability for economic loss, death, personal injury, and disease, along with sections on causation and retroactive liability, continue to concern Minnesota businesses. The same provisions are causing the insurance industry to review the extent of their liability under the law, industry spokesmen indicated in interviews with BNA.

Because of the uncertainty surrounding the intent of these provisions and the lack of case history under the new law, firms are uncertain about what actions to take regarding superfund liability insurance, according to Timothy Butler, an environmental lawyer with the Minneapolis firm Lindquist, Vennum.

Under the state superfund law, companies can be held liable for wastes generated since 1960. However, if a firm is able to prove it was not engaged in an "abnormally dangerous" activity, it is only liable for wastes generated since 1973, another Minnesota lawyer explained.

The state superfund statute establishes a statutory cause of action for any past or future economic loss, death, injury, or disease caused by exposure to hazardous waste. Under the statute, the defendant must prove that the methods used to dispose of the waste were safe. According to the strict liability provisions of the law, a company may be held liable even if it is not found negligent.

Company Stops Writing Coverage

Concern over the availability of environmental impairment liability insurance for Minnesota firms developed earlier this year when Environmental Risk Analysis Systems (ERAS) Ltd., one of the first worldwide underwriters of environmental impairment insurance, announced it would not provide coverage for firms subjected to the medical causation and personal injury clauses of the Minnesota law.

R.M. Aiken, director of ERAS, said in a letter to the American Insurance Association that as the Minnesota superfund law stands, "we feel that the burden of proof is unreasonably altered [so that] we cannot provide insurance for the onerous liability regime it imposes."

Aiken also said he believes the liability provisions of the statute will allow a plaintiff "simply to show, 'I have cancer, cancer may be caused by goo, you handle goo, so you are liable.'"

But Minnesota Pollution Control Agency Executive Director Sandra Gardebring called that argument a "gross exaggeration," and indicated that proof of liability would be required under the law as in any personal injury case. However, she suggested some clarification of the medical causation clause may be appropriate.

27 Firms Said Unable To Get Insurance

One opponent of the medical causation and retroactive liability clauses of the law is the Minnesota Association of Commerce and Industry. Ray O'Connell, association environmental specialist, said he is aware of 27 Minnesota firms that have been unable to obtain environmental liability insurance and expressed concern about the effect of the law on Minnesota's business climate (July 1, 1983, p. 358).

O'Connell cited as an example of the unfavorable effect of the law a decision by McLaughlin Gormley King Co., a chemical specialty manufacturer, to expand its facilities in South Carolina rather than Minnesota because retroactive provisions in the superfund statute have made it impossible to obtain insurance for a planned hazardous waste storage facility.

The company's decision to build a new process facility in South Carolina was announced at a press conference held in Minneapolis by the Chemical Specialties Manufacturers Association. Association Chairman Jon R. Grunseth said the group had released a "fact sheet" advising its members to consider "the potentially severe business and economic implications of locating or expanding operations in Minnesota" because of the personal injury sections of the state superfund law.

Gardebring told BNA that a McLaughlin Gormley King facility is on a list of 61 sites in the United States where hazardous wastes were disposed of improperly and where signficant environmental damage has been observed. According to the Minnesota Pollution Control Agency, soil and groundwater at the plant site in Minneapolis have been contaminated by dichloroethane.

"The firm's troubles in obtaining insurance may well stem from this record of contamination," Gardebring said. For "the company to obtain [environmental impairment liability] insurance is like trying to buy fire insurance after the house has burned to the ground."

However, Gardebring added, enough concern has been raised that a state survey of pollution liability insurance availability has been moved up and the results of the study will be made available in August 1984.

The Pollution Liability Insurance Association, a reinsurance pool of 48 member insurance companies, is also studying the issue, according to Dudley Morrison, manager of the pool.

A decision is expected to be made in June on whether to continue issuing the policies in Minnesota, Morrison said (March 30, p. 2198).

Several other reinsurance firms contacted by BNA declined to comment on whether they plan to continue providing environmental coverage for Minnesota concerns.

Firm Will Continue Writing Policies

One firm, Corroon & Black of Minnesota Inc., has stated its intent to continue writing environmental impairment insurance for Minnesota firms. Carole Magnuson, account executive for Corroon, said the costs of the insurance have risen, "but the coverage is still available."

She explained that only six or seven firms are knowledgeable enough in this area to write the insurance. "The policies are very personal," she said, "and every single risk is underwritten."

No company is going to buy a loss, according to Magnuson. "That would be like buying life insurance for a dead man," she said. But if a firm is approved by risk assessors and warrants that there are no outstanding lawsuits, a policy usually can be written, she said.

Magnuson said her firm is not alarmed by the 1960 retroactive liability provisions of the state law because the insurance written by Corroon & Black is retroactive automatically to when the company began at the insured site.

The primary carriers available to Corroon & Black are American International Group, Shand Morehan-Evanston Insurance Co., Dryden-Gibralter Insurance Co., and Swett & Crawford-Pacific Insurance Co., according to Magnuson. She said she was "convinced that any reasonable company willing to pay a reasonable price can get coverage."

Changes to Law Possible

However, O'Connell said the state superfund law must be revised to reflect reality. He emphasized the important role that cost projections play in the business community and said he believes some legislative alterations will be made to provide firms with a necessary degree of certainty.

He also said the Minnesota Association of Commerce and Industry will seek to limit the liability to 1980, the date of enactment of the federal superfund law, or 1983, the date of enactment of the Minnesota superfund statute. The association is seeking repeal or limitation of the retroactive liability clause and an elimination of the clause that places the burden of proof on the defendant company, he said.

Proponents of the exisiting superfund measure said that, without the statute, firms still would be held liable under common law. However, Minneapolis attorney G. Robert Johnson questioned why a three-year battle was fought over the bill if that was the case. Johnson, who practices with the law firm Popham, Haik, Schonbrich, Kaufman, Doty, Ltd., said another concern stems from the idea that potential liability is based on the nature of a substance as defined by the Minnesota Pollution Control Agency.

The law mandates strict liability for substances determined by the agency in 1980 to be hazardous. But because the hazardous substance list was not developed until 1980, "the law is saying 'you should have known even before 1980 that the substance was hazardous,' " Johnson said.

Insurance Pool Considered

Although no figures are available yet on the number of Minnesota firms not covered or the total number of reinsurers that will no longer provide environmental impairment liability insurance in Minnesota, state officials are considering developing a state insurance pool, which would be funded by businesses that handle hazardous wastes.

Under the proposal, which is expected to be introduced during the 1985 legislative session, each firm that generates, transports, or stores hazardous wastes would be responsible for its own liability up to $150,000. Awards and settlements above that amount would be paid with funds from the reinsurance pool, according to the proposal's author, state Rep. Wayne Simoneau.

Contributions would be prorated according to company size, but firms would pay "significantly less" than they would have paid in commerical insurance premiums, he said.

However, Gardebring and Sue Robertson, director of the Legislative Commission on Waste Management, said no actions will be taken on the proposal until the state is able to "analyze factual information and make a rational decision."

Environment

Liability, Compensation, Funding

The Hazards of Hazardous Waste Policy

Hazardous waste is the most highly charged of environmental issues, pitting industry against public interest groups in an emotional, divisive confrontation. But the accusatory rhetoric isn't going to solve the problem, which requires the well-managed use of adequate deterrents and cleanup funds. This article, the first in a series, details some of the facts that can help us design such a solution.

by Barney Wander

The newspaper headlines are familiar: "Attorney General Vows Prosecution for Illegal Dumpers." "Companies Sued for Millions in Cleanup Costs."

Articles in law journals may be less familiar, but they are no less frequent. Entire volumes are being devoted to environmental law, and a new legal catchphrase, "toxic torts," has been coined.

State legislatures across the country are being asked by the public to "do something" about the "problem" of hazardous waste. When the issue is hazardous waste, the public usually writes "problem" with a capital "P".

Any discussion of hazardous waste issues must recognize certain facts:

- Despite great improvements in recent years to reduce, re-use, or recycle waste materials, many industrial processes will continue to generate wastes as an inevitable consequence of the manufacture of useful products.
- Unless major new scientific developments occur, some wastes cannot be destroyed or detoxified by so-called advanced technologies, and must continue to be disposed of in or on the land.
- Not all hazardous wastes pose equal degrees of danger to health or the environment. Some are designated "hazardous" only because laws define them as such; many are hazardous only under certain conditions. Still others must be managed skillfully and with considerable technical expertise if they are to be managed properly.
- The cost of managing hazardous wastes is an integral cost of the manufacturing process, and as such is ultimately borne by the consuming public. The cost of regulating the management of hazardous waste also is borne by the public, directly through taxation or indirectly through increased cost of goods. Therefore, while the effectiveness of hazardous waste management and regulatory programs is paramount, it is important that costs of such programs be as reasonable as possible.
- The management of wastes currently generated and the correction of problem waste disposal sites created in the past are two separate problems. There are a host of federal, state, and local laws—most of them enacted in the past five to seven years—to control hazardous wastes currently generated. It is generally agreed that

Barney Wander is a free-lance writer specializing in environmental subjects. He expresses gratitude to John C. Peet Jr., vice president and general counsel of Rollins Environmental Services Inc., for assistance in the preparation of this article.

Series

This is the first of four articles dealing with various aspects of the hazardous waste problem.

Over the past several years, hazardous waste issues have become the most publicized of all environmental issues. While such publicity may or may not reflect the true extent of actual environmental problems, there is widespread public perception that steps must be taken to provide for better management of hazardous wastes.

Keeping in mind the basic premises established in this first article, which concentrates on problems of liability, compensation, and taxation, subsequent articles will discuss:

- Banning, specifying, or otherwise controlling disposal options;
- Siting new hazardous waste disposal facilities; and
- Transportation of hazardous materials, including hazardous wastes.

No state legislature is immune from eventual consideration of these hazardous waste issues, which can have important consequences for state government, industry, and many citizens. This series is designed to promote informed decision-making in state legislatures when hazardous waste issues arise.

hazardous wastes are more strictly regulated today than they have ever been—although there is still disagreement about whether stricter controls are needed in specific instances. The correction of old or abandoned problem hazardous waste sites presents a series of issues that are largely unrelated to current waste management practices, and therefore it is important to keep these two areas separate.

When legislators begin treading the path of hazardous waste liability issues, they are walking on new ground—these issues traditionally have been the concern of courts, not legislatures. For this reason, some background information and definitions are useful.

Liability

A tort is a civil wrong or trespass, other than a breach of contract, for which a court will provide a remedy or give a redress. The forms of remedy can include an action for damages, an injunction, restitution of what has been wrongfully taken, or compensation to an injured party. A tort is not a crime, is not a breach of contract, and is not necessarily concerned with property rights or the problems of government, although it may be closely intertwined with these other fields of law. Assault, battery, trespass, and negligence are all torts, even though they also may be subject to criminal law.

Torts historically have been part of what is called "common law"—that is, the legal system that originated in England, moved to the United States, and is based on judicial precedent rather than legislative enactments. Common law is derived from principles rather than rules and does not consist of absolute, fixed, inflexible requirements, but rather of broad, comprehensive principles based on justice, reason, and common sense. Common law can change as community standards or expectations change. For example, in the area of malpractice, people today are less willing to accept the advice or actions of professionals when things go wrong, and new guidelines are evolving in the courts for what is considered reasonable, proper professional conduct.

The management and disposal of hazardous waste has increasingly become a subject of tort law, and is still an evolving area. The issue has caught the attention of the legal profession, the popular media, state legislatures, and the public at large.

In general, a person is liable in a tort action when he causes unreasonable interference with the interests of others. In order to be found liable in a tort action, a person must have departed from what is called a "reasonable standard of care," and this departure must cause some kind of problem for someone else. When this happens, the person is liable for his actions and is responsible for any losses suffered by others.

The intentions of the liable party usually are not an issue; liability may be imposed for good intentions and innocent mistakes as well as for deliberate or intentional actions. Being held liable for civil damages is usually not equivalent to committing a criminal act. This distinction between criminal acts and civil liability is important when considering actions involving hazardous waste. Several states recently have moved to make inadequate or inappropriate past waste-disposal practices punishable under criminal laws instead of, or in addition to, tort actions to be resolved in civil courts.

Executive Summary

- In establishing criteria for liability in hazardous waste disposal, legislators should recognize they are encroaching on an area traditionally left to the courts. If such encroachment is undertaken, then principles such as apportionment of liability and protection of due process rights should be taken into account.
- In considering compensation programs for alleged victims of exposure to hazardous waste sites, the requirement of sufficient elements of proof should not be abandoned, nor should people be allowed to use administrative compensation as a way to pursue additional compensation in the courts. Careful drafting of compensation program legislation is required to avoid serious abuses
- Funding of state "Superfund" laws or compensation programs can make use of a variety of sources, but these sources must be carefully selected based on a true evaluation of need and a recognition that some taxing schemes could become unrealistically burdensome on certain classes of taxpayers. Because Superfund programs will pay only for costs which cannot be assigned to identified responsible parties, these public costs may be relatively small in many cases.
- Because of the probability of the reauthorization and extension—in time and finances—of the federal Superfund, states should be cautious about establishing their own programs until the new federal program has been established. To protect their own interests, states should become involved in the current federal debate.

Double Standards

One difficulty with this approach is that past waste-disposal practices may have conformed to previously existing requirements but may not comply with new, more stringent laws. Therefore, the wisdom of using criminal laws for punishment in these cases is questionable. In addition, the elements of proof required of the state for a criminal conviction are far more difficult to establish than the proofs required to prove civil liability.

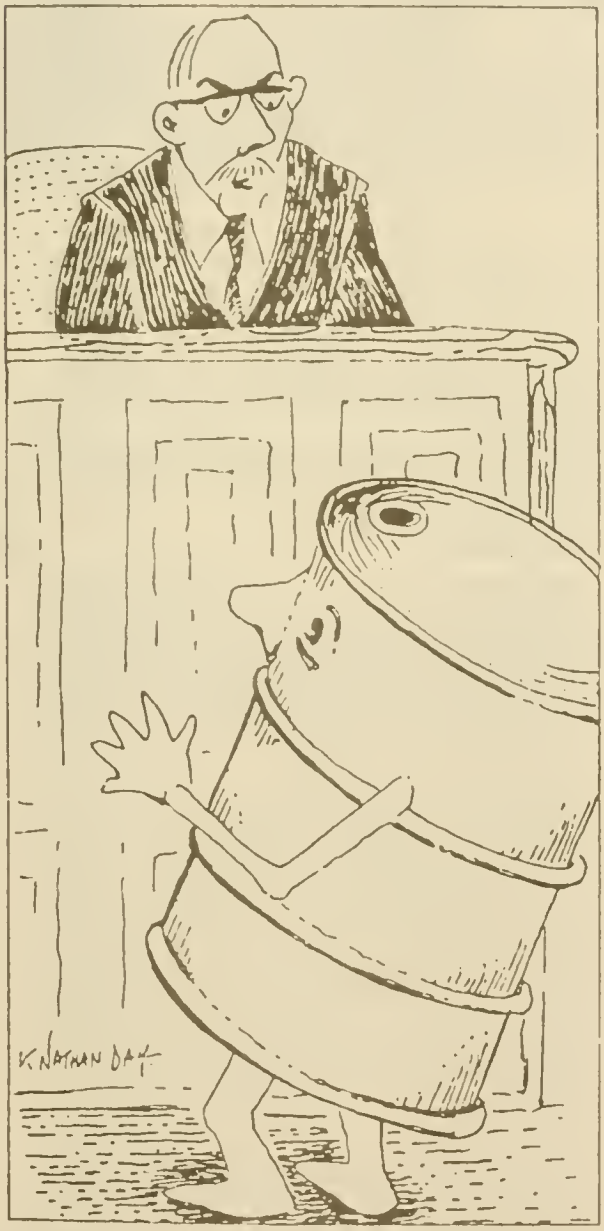
There should, therefore, be a different standard applied to a person who knowingly disposed of wastes in an unsafe manner—and thus could be considered for a criminal action—and a person who acted in good faith and used accepted technology, but is now faced with the fact that a past waste disposal site is causing an environmental problem—and thus may be subject to a tort.

There are certain necessary elements to any tort action: the existence of a tort (injury, damage, etc.) must be proved; the responsibile party or parties must be identified; causation must be established; fault must be proved. These elements, required in courts, must be kept in mind when legislatures consider involvement in this traditionally judicial area.

Two more terms require definition: "joint and several" liability and "strict" liability. "Joint and several" means that liabilities are shared collectively and individually. Under this legal theory, when several persons are potentially liable, all can be sued together, or only one party can be sued for the sastisfaction of the full amount of the alleged damages. If a single party is sued, then it is up to that party to sue the others for their

alleged shares of the damage caused.

Strict liability means "without fault" and differs from the norm of tort law, which says there can be no liability without fault, fault being a failure to live up to a specified standard of conduct. Strict liability comes into play when an activity is so unusual, abnormal, or dangerous that it automatically threatens others. The owner of a pet tiger, for example, is automatically considered liable for any damage the tiger may cause, regardless of any fault of the owner. Flying airplanes was once considered so dangerous that it was an activity subject to strict liability, but this designation has disappeared from laws and court decisions. But while courts have been extremely reluctant to apply or extend the principle of strict liability, there have been moves in a number of state legislatures to make companies strictly liable for hazardous waste activities.



When legislatures are asked to write laws governing hazardous waste liability, they are, in essence, being asked to remove these considerations from the courts where they resided for centuries, and also to eliminate the flexibility and gradual evolution that are characteristics of case law but not of statutory law. Thus, any step in this direction by a legislature should be seriously considered, with full realization of the potential consequences.

Mini-Superfunds

So far, attempts to create hazardous waste liability statutes have been aimed almost exclusively at past waste disposal practices rather than current activities. The existence of an old, and potentially dangerous, hazardous waste disposal site in a community can create strong social pressures on a legislature to enact laws requiring the cleanup of such sites, including methods for determining who is liable. Usually these are called state or "mini" Superfund laws—a reference to the Federal Comprehensive Environmental Response, Compensation, and Liability Act, usually referred to as "Superfund." Such legislation assumes that the federal effort will be insufficient to correct all past waste-disposal problems that exist in a state, and therefore a separate or additional state program is required.

The argument that additional state Superfund legislation is required is not as strong as it once was. Within recent months, it has become apparent that the federal Superfund will be extended in time and expanded in its financial scope. Extension of the Superfund law has strong support in Congress and from the Administration, but there are sharp differences of opinion as to whether Congress needs to act this year and how much the Superfund tax base needs to be increased. It is likely, however, that the size of Superfund will be significantly increased when Congress finally acts.

Another factor reducing the necessity for additional state Superfund laws is the increasing willingness of industry to undertake clean-up programs voluntarily. The Chemical Manufacturers Association and individual major chemical companies have stated publicly that they are embarking on such programs, and attempts in state legislatures to add additional controls to the clean-up effort may serve to discourage rather than foster this process. If a company believes it will be put at a legal disadvantage by taking a cleanup action, it may choose instead to fight projects in court to lessen their liability, and this will only serve to delay the cleanup process.

When the issue of a state Superfund does arise in a state legislature, some key provisions must be addressed: changes in tort law, compensation of alleged victims, and funding sources. The general principles involved in the liability issue have already been discussed, but some specifics also deserve examination.

If the subject of liability is addressed, it should include provision for apportionment of liability among, as well as mandatory joinder of, all responsible parties. If site response is necessary, then the funding should be derived from the joined parties and those to whom liability can be apportioned. Such an approach will not do violence to the traditional standards for joint and several liability, and will ensure that sufficient funds are available for cleanup projects without unjustly and unfairly burdening any single party.

Any attempts to specify that hazardous waste activities should be subject to strict liability should be

avoided. Despite the use of the term "hazardous" waste, most industrial wastes are not, in fact, more hazardous than the chemical products that give rise to the wastes. The management and disposal of hazardous waste today is tightly controlled by a complex network of federal and state laws. The fact that problems have occurred in the past does not mean these problems will recur today in a significantly stricter regulatory climate designed to prevent future problems.

Legislative efforts to codify common law should not be undertaken hastily or lightly. After a while, such efforts will chill what is normally an evolving activity and place arbitrary limits on a narrow segment of tort law.

Compensation

Another issue that has surfaced in state legislatures in regard to past waste-disposal practices and their correction is the compensation of persons allegedly harmed by the activity. While this issue is related to the liability question, it raises important separate issues.

As is the case with liability, there are existing remedies for persons who claim they have been harmed. Any person has the right to go to court and seek compensation if he believes he's entitled to it. Some critics have argued, however, that existing remedies are not sufficient and that alternate mechanisms should be found. It has been noted, for example, that because the federal Superfund is silent on the point of victim compensation, some victims, for financial or other reasons, may not be able to take advantage of the compensation opportunities offered by the courts.

However, some of the congressional proposals for reauthorization and extension of the federal Superfund do indeed include compensation provisions, and the issue is being hotly contested. The administration strongly argues that victim compensation legislation should be considered separate from Superfund because it is a fundamental issue having broad economic and legal ramifications and, as such, should not be driven by the Superfund debate alone. Furthermore, attorneys frequently take such cases on a contingency basis, and—if the case is strong enough—an individual alleging harm usually will find no difficulty in seeking legal help.

Nevertheless, some legislatures have been considering ways to compensate alleged victims of injuries caused by exposure to the materials in hazardous waste disposal sites. A variety of methods have been either proposed or discussed, the most common of these would establish a fund from which people would be compensated administratively. This, however, creates a major problem that must be addressed in the establishing legislation—namely, how to prevent abuses that will deplete the fund and thwart the very purpose of the legislation.

In a court action seeking compensation, the plaintiff has the burden of proof and must establish his right to be compensated, as well as justify the amount of compensation. Defendants in such cases also have certain rights that protect them from unjustified decisions and awards. Any administrative system of compensation that does not contain similar protection can lead to a

severe and unjustified drain on the fund established to finance it. There should be certain minimum elements of proof required: proximity to the site, a reasonable correlation between the injury and the ability of the site to cause such an injury, verification of claims of injury or illness by medical professionals, and a reasonable relationship between the injury caused and the award given.

In addition, all concerned parties (claimants and defendants) should be able to submit evidence in the administrative proceedings.

Funding Limits

Another potential way to control expenditures from a compensation fund, obviously, is simply to establish a cap for the fund. Without a finite limit on the amount of money available, administrators may not apply sufficient discretion in how the funds are spent. It must be realized, however, that it may be difficult to turn down people who request compensation just because there is not enough money in the fund.

In addition to a compensation fund and a system for administering it, consideration must also be given to other avenues still open for compensation. If a person elects to use the administrative compensation system, then that person should not also have unlimited access to judicial compensation as well. A person should not be allowed to "double dip" and be compensated for the same injury twice—once administratively and once in the courts. This does not mean that judicial avenues should be cut off, however. It does mean that if a person is dissatisfied with the administrative decision, he should be allowed to seek compensation in the courts—but only if the amount awarded in the administrative procedure is not collected. This is an important protection for the source of the administrative compensation funds, whether taxpayers generally or specific industries are the source of money to support remedial or compensation programs.

In addition, administrative board findings, decisions, defendant participation (or lack of it), or settlements should not be admissible as evidence in judicial proceedings.

Funding

Any state Superfund program—indeed, any program to compensate alleged victims of exposure to hazardous waste sites administratively—is going to have to be funded, and the costs will not be small. In addition to money spent for actual cleanups or compensation, the administrative costs of these programs will be major. Therefore, the source of funding is an important question.

In general, there usually are two sources for such funding: the state's general revenue funds or a specific tax on designated industries. If the latter route is considered, there are yet more options: a so-called "front-end" tax on chemical raw materials (such as that used by the federal Superfund) or a "back-end" tax on hazardous wastes disposed of.

Individual states may decide this issue differently, depending on individual circumstances. A state with relatively few hazardous waste problems may find the use of general funds acceptable, costs will be small, and the additional costs of the bureaucracies needed to administer the programs is unwarranted. In making a cost determination, it is important for any state to realize that most clean-up costs probably will be borne by responsible parties—that is, entities that can be identified as having an involvement with old hazardous waste sites. Superfund programs—at any level of government—should be designed to cover only those costs that cannot be apportioned among the identifiable, responsible parties.

The front-end and back-end tax positions both have proponents. In a state where very little hazardous waste is generated, the required back-end tax rate might be unrealistically large. On the other hand, such a tax could help reduce the amount of waste generated—a desirable social, if not a financial, objective in such a state. It also is argued that a waste tax is more equitable because it involves all waste-generating industries, whereas a front-end tax on chemical feedstocks, for example, does not necessarily include all these industries.

In other states, however, a front-end tax will result in a lower tax rate for many industries, and this could be an important consideration in the state's ability to attract industry. Depending on the sophistication of a state's record-keeping systems, a front-end tax may or may not be more easily calculated and collected. It is therefore imprudent to suggest that all states electing to establish hazardous waste management programs that require substantial funding adopt the same funding mechanism. This is an issue each state must study to determine a system that will neither be overly burdensome on industry nor result in insufficient funding. It also should be remembered that if Congress extends the federal Superfund program—as is expected—this money will be available to the states for cleanup programs, thereby lowering or eliminating the need for additional state funds.

It would be prudent, therefore, for many states to wait for action in Congress, which is expected no later than next year. More accurate calculations can then be made of individual state needs, and programs adopted accordingly.

Conclusion

The need for Superfund-type cleanup or administrative victim compensation programs to supplement existing or expected federal programs will vary considerably from state to state. In establishing such programs, legislators should be careful not to violate established tort law systems or to disregard traditional legal defenses. To raise necessary funds for any programs that are established, each state should carefully review both its needs and funding sources to establish a program that is neither inadequate or oppressive. With an emotional subject such as hazardous waste, it is not always possible to pursue a reasonable approach in considering this kind of legislation, but any approach that is not well conceived and carefully drafted may ultimately do more harm than good. ■

APPENDIX G

STATEMENT OF CARSON CARMICHAEL, III
BEFORE THE HAZARDOUS WASTE STRICT
LIABILITY STUDY COMMITTEE
OCTOBER 12, 1984

My name is Carson Carmichael, and I am an attorney with the Raleigh law firm of Bailey, Dixon, Wooten, McDonald & Fountain. I am appearing on behalf of the American Insurance Association, and I appreciate the opportunity to speak with you today.

The American Insurance Assoication is a trade association composed of over 170 publicly-owned insurance companies that presently provide the majority of general commercial liability insurance in the United States. It is likely that the members of AIA will be asked to provide insurance in the future for companies subject to liability for claims of injury and damage resulting from hazardous waste. Insurers, in most cases, have been able to respond as environmental liabilities have emerged from our legislative and judicial processes. New coverages have been developed and competitively marketed. Our members are concerned, of course, that the liability system as it develops is reasonable, equitable and insurable, so that we may continue to serve the public by providing insurance.

The purpose of this study committee, as stated by House Bill 738, is "to study the issue of strict liability for damage resulting from hazardous waste in North Carolina"

and report to the 1985 General Assembly. This is an extremely important issue with potentially far reaching consequences, so we ask the committee to proceed with the utmost care.

The insurance industry wholeheartedly supports efforts to clean up the environment. The first and foremost way to prevent pollution is rigorous enforcement of sound environmental regulations by the state. In contrast, the law of torts, as implemented by our courts, is the primary medium for resolving disputes concerning claims alleging injury or damage from hazardous waste. It provides three benefits: (1) justice, (2) compensation, and (3) incentives for proper conduct and liability for improper conduct that causes harm.

We oppose proposals that detract from these traditional functions by removing standards of due care and principles of fault and causation. Such proposals result in a costly and unfair system if liability is unlimited and unpredictable. A prudent business that properly disposes of its waste may end up bearing the entire financial burden resulting from the totally independent actions of a negligent or willfully criminal party. This makes traditional underwriting based on assessment of risk impossible and the insurability of such risks doubtful at best.

The American tort system is extremely flexible and solutions to new problems are constantly evolving. The

American Insurance Association opposes substantial changes to this system that would abandon standards of care and causation without convincing proof that the system is failing to handle these cases in North Carolina.

We want to continue to provide coverage at affordable costs for risks involving hazardous waste. Thank you for the opportunity to express our views, and we offer our assistance to you as you study this important issue.

APPENDIX H

Minnesota
Waste Management Board

Report on Allocation of Liability
Among the Owners, Operators, and Users
of a Hazardous Waste Disposal Facility

February 23, 1984

D.4 Availability of Insurance for Hazardous Wastes

a. Opinions on Effects of ERLA

When ERLA was passed by the Minnesota Legislature in 1980 concern was expressed that because of provisions in the Act, particularly those provisions regarding personal injury, insurance companies would be unwilling to insure for hazardous wastes handled and/or disposed in Minnesota.

In addressing this question, a number of insurance representatives were asked for their opinions. Underwriters were basically divided into two camps on the question of providing personal injury coverage in EIL in Minnesota. A few major EIL carriers are adopting a policy of not providing personal injury coverage in EIL in Minnesota. Another group is open to providing personal injury coverage in EIL insurance in Minnesota, although they are still expressing cautious optimism about the future of such coverage in Minnesota.

The concerns of the underwriters who are excluding personal injury coverage in their EIL in Minnesota are varied. Representatives of these carriers have stated that they feel overexposed to risk from personal injury claims in

Minnesota due to the causation provisions in ERLA (see discussion of ERLA in Section A.3). They felt that it would be too easy for a plaintiff to get his/her case to a jury, and, once before the jury, felt that the chances were too great of verdicts being directed against the defendants for very unpredictable and possibly huge sums. Based on these assumptions, these companies have adopted a policy of at least temporarily not writing EIL in Minnesota.

The same underwriters who expressed concern over the causation provisions in ERLA also expressed concern for the joint and several liability provisions for personal injury in ERLA. They felt that a defendant should not be required to pay more than his/her apportioned share of liability. ERLA allows for a defendant to pay only up to twice his/her apportioned share. ERLA, then, really embodies a limited form of joint and several liability, as full joint and several liability would not allow for a cap on a person's liability at two times their apportioned share.

An additional concern of some of these carriers relates to recent losses suffered, claims pending against them and concerns about already being overexposed to risk due to past policies written in Minnesota.12/

Political considerations also appear to be playing a role in the decision by some not to write EIL in Minnesota. A representative from one company which has decided not to write EIL in Minnesota under its current statutory provisions indicated that if enough carriers adopted blanket exclusions of not writing EIL in Minnesota it might force a change in the law. This could be done by causing EIL to become totally unavailable in Minnesota and thus pressure the Legislature to change the statutes according to the preferences of the insurance industry. Alternatively, EIL might remain available but only from a monopoly market. The implication of being able to purchase EIL from only one or a few carriers might be considered too undesirable, so again, the Legislature might modify statute

...e to the liking of the insurance industry.

Other underwriters expressed the opinion that they would provide personal injury coverage in Minnesota and didn't feel that they were overexposed to risk by the provisions in ERLA. These underwriters felt that ERLA did not deviate significantly from common law, and therefore did not significantly increase their risk exposure. Furthermore, they stated that ERLA tended to parallel a national trend in establishing liability for personal injury.

These underwriters did not seem extremely concerned about ERLA's joint and several liability provisions. Many felt that the courts would impose liability jointly and severally for pollution accidents whether or not it was specifically spelled out in ERLA. Some felt that the imposition of full joint and several liability standards for cleanup costs under the federal Superfund indicate a trend towards the same standards for personal injury liability.

The majority of underwriters interviewed expressed cautious optimism about writing coverage for personal injury. Even many of those underwriters who said they would not provide such coverage in Minnesota left open the possibility of changing that decision in the future if it seems that underwriters who choose to cover personal injury in Minnesota do not become overexposed, (i.e. pay out a large number of major claims).

b. Costs of Insurance

1. Minimum deductibles

Minimum deductibles for EIL insurance range from around $1,000 to $10,000 for hazardous waste generators. The size of the deductible may depend on the results of the risk assessment, limits of coverage, premium level and philosophy of the individual insurance company regarding deductibles. Some carriers have a set policy for what the minimums will be while others don't, but choose to negotiate the minimums on a case-by-case basis.

The deductible levels for EIL insurance for hazardous waste disposal facilities are considerably higher than for generators. Insurance companies like to see disposal facility operators carry as large a deductible as possible. Levels of from $1 million to $5 million are feasible.

2. Premium levels

It is impossible to suggest that there are average EIL insurance premium levels for hazardous waste generators. The premium levels are set in response to a multitude of factors (see "Risk Analyses" discussion). These levels can range anywhere from around $500/yr. to tens of thousands per year. For example, a very conscientiously run dry cleaning shop could pay as little as $500/yr. in premiums to purchase EIL annual aggregate coverage of $500,000.

The possible premium levels for a hazardous waste disposal facility in Minnesota have been estimated by one insurance broker to range between $60,000/yr. and $70,000/yr. to purchase EIL coverage of $20 million per occurrence, $40 million annual aggregate.

Costs for post-closure insurance coverage, if it were to be made available, would be 7% to 15% of the limits of liability in the policy, paid in the form of annual premiums. Premiums and limits of coverage are subject to annual negotiation.

c. Availabilty of Insurance to Small vs. Large Generators

EIL insurance is available to Minnesota businesses which generate hazardous waste regardless of their size. However, the costs of this insurance may be less burdensome to larger businesses. The insurance industry would much rather insure a clean and tightly regulated business generating hazardous waste than a business which conducts its operation with less care. They would therefore rather insure a small generator than a large one if the smaller one conducts his/her operations in a manner which the insurance companies feel exposes them

smaller risk. However, economies of scale tend to make insurance more affordable to a larger generator than a smaller one.

As discussed above, EIL underwriters generally require minimum annual premiums of hazardous waste generators around $500. Minimum deductibles may range from around $500/yr. to around $5,000/yr. It should be stressed that these amounts are minimums and would generally be the prices paid by the smallest generators running the cleanest operations.

From the standpoint of managing a business' cash flow it is obvious that a larger generator is less affected by such fees than a smaller generator. This factor, combined with the higher relative risk assessment fees paid by smaller generators, make it more difficult for smaller generators to obtain insurance than larger ones.

d. Availability of EIL Insurance to the Operator of a Disposal Facility

As long as the results of the risk assessment of a hazardous waste disposal facility are favorable, it appears that the operator of a hazardous waste disposal facility in Minnesota could buy EIL insurance. "Favorable" would be defined as a conclusion that the facility presents a relatively low risk of causing environmental impairment. As long as insurers feel the risk is manageable they will offer insurance to the operator. (See "Risk Analyses" for factors considered.)

e. Availability of EIL Insurance to Generators

Again, availability of insurance depends mostly on the results of risk assessments. Those generators conducting safe operations will generally find EIL available. Most, however, only have "sudden and accidental" coverage via their CGL policies, especially if they are not engaged in on-site storage operations. Many generators currently rely on the indemnification clauses in the disposal facility operators' contracts for gradual pollution coverage.

Although insurance coverage is available, the national trend indicates that there is an increase in the numbers of inquiries about EIL insurance on the part of generators of all sizes, but very little buying. Insurance company representatives and local brokers all agreed that the situation in Minnesota fit into this national trend. It was generally felt that a lack of regulatory pressure on behalf of the EPA in the last few years was contributing to the slow buying pace of EIL insurance. Most people interviewed felt that buying would accelerate as a function of the health of the economy in general, media coverage of pollution accidents and regulatory pressure by the EPA setting insurance requirements for hazardous waste generators. Until such events transpire, brokers say that the generators are delaying buying EIL coverage and hoping they will not be involved in a situation where they would need it. Many generators are at least becoming curious about whether they need EIL, what it offers and how much it will cost. Upon discovering the answers to the above, there apparently remains an interest in eventually buying EIL, but not a strong movement towards buying it when not obligated to by law.

f. Availability of EIL Insurance to the State

Again, availability would depend upon the results of risk assessments. However, if the state were assuming liability from other parties, insurers would be concerned about which parties are relieved of their responsibilities. Insurers like to see the facility operators maintain some liability for the operation of a disposal facility because that gives the operator(s) incentive for safe operations at the facility.

Insurers expressed no difficulty with naming the state as an insured on the operator's policy or vice versa. Insurers are favorable to the idea of insuring the state, given that it will probably persist as a solvent entity for a long time period.

APPENDIX I

SESSION 19_____

INTRODUCED BY:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PROVIDE FOR STRICT LIABILITY FOR DAMAGES RESULTING FROM HAZARDOUS WASTES IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

Section 1. Short title. This act may be referred to as the Hazardous Waste Strict Liability Act of 1985.

Sec. 2. Purpose. The purpose of this act is to provide for a workable strict liability system for hazardous wastes injuries occurring in North Carolina as recommended in the 1983 Report of the Governor's Waste Management Board.

Sec. 3. Creation of a strict liability system for hazardous wastes injuries. Chapter 130A of the General Statutes is amended in the following manner:

(1) By amending G.S. 130A-290 so that the following definitions shall apply throughout Article 9 of Chapter 130A:

"(1) 'Caused by' means caused in fact. If the evidence offered by any party tends to show that the damage of which the claimant complains was caused by both a hazardous waste occurrence and other causes, liability under G.S. 130A-307 shall be limited to damages attributable to the hazardous waste occurrence."

"(1b) 'Claimant' means a person damaged by a hazardous waste occurrence."

"(1c) 'Comprehensive hazardous waste treatment facility' means a facility designated as such by the Governor's Waste

Management Board, meeting the following criteria:

a. It is a commercial facility that accepts hazardous waste from the general public for treatment;

b. It has the capacity and capability to treat and dispose of hazardous waste on at least an intrastate regional basis; and

c. Its location will substantially facilitate treatment of hazardous waste for the State of North Carolina."

"(1d) 'Disposal' means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste into or on any land so that the solid waste or any constituent part of the solid waste may enter the environment or be emitted into the air or discharged into any waters, including groundwaters."

"(7b) 'Hazardous waste management' means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery and disposal of hazardous wastes."

"(8) 'Hazardous waste occurrence' means any sudden or nonsudden occurrence in which damages result from any quality or characteristic of a solid waste, as defined in G.S. 130A-290 (18), which quality or characteristic causes the waste to be a hazardous waste under this Article and the rules and regulations adopted pursuant to it."

"(23a) 'Strictly liable' means liable without regard to the defendant's negligence or fault. The defendant's foreseeability of danger or risk arising from or injury or other consequences caused by a hazardous quality or characteristic of the waste either at or prior to the occurrence shall not be

relevant to a determination of liability."

(2) By adding a new section G.S. 130A-307 to read as follows:

§ 130A-307. Hazardous waste liability.--(a) This section applies only to hazardous waste occurrences caused wholly or partially by a defendant's operations or activities occurring after the effective date of this act. This section does not apply to any hazardous waste occurrence caused wholly or partially by hazardous waste generated prior to the effective date of this act. This act does not prevent a claimant from pursuing any cause of action that existed under statutory or common law prior to the effective date of this act. For the purpose of this section, waste polychlorinated biphenyls shall be considered a hazardous waste. Furthermore for the purposes of this section, governmental immunity from strict liability for personal injury or property damage caused by a hazardous waste occurrence is hereby waived, but only to the extent that damages do not exceed the amount of damages authorized by the North Carolina Tort Claims Act, G.S. 143-291. Any agency of the State of North Carolina that generates, transports, treats, stores, or disposes of hazardous waste is hereby authorized and empowered to procure proper insurance against such liability.

(b)

(1) Subject only to the defenses set forth in subsections (c) and (e) of this section, the generator, transporter, treater, storer, or disposer in control of a hazardous waste at the time of a hazardous waste occurrence shall be strictly liable for personal injury or property damage caused by the occurrence.

(2) Subject only to the defenses set forth in subsections (c) and (e) of this section, the generator of a hazardous waste, whether or not in control of the hazardous waste at the time of an occurrence, shall be strictly liable for personal injury or property damage caused by hazardous waste occurrences arising from the hazardous waste generated. Under this subdivision, the generator shall be jointly and severally liable together with the transporter or any other person in control of the hazardous waste at the time of the occurrence. For purposes of this subsection, any person that accepts a hazardous waste from a transporter for storage and causes the hazardous waste to be again transported shall be considered a generator.

(c) There shall be no liability under subsection (b) for a person otherwise liable who can establish by a preponderance of the evidence:

(1) that the claimant had knowledge of the danger and voluntarily and unreasonably encountered that danger; or

(2) that the hazardous waste occurrence was caused solely by any one of the following:

(i) an act of God;

(ii) an act of war or sabotage; or

(iii) an intentional act or omission of a third party (but this defense shall not be available if the act or omission is that of an employee

or agent of the defendant, or if the act or omission occurs in connection with a contractual relationship with the defendant).

(d) Nothing in this section shall bar or otherwise affect the transfer of liability to the Post Closure Liability Fund, under Section 232 of the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980.

(e)

(1) Subject to the provisions of subsection (g), any defendant who proves that hazardous waste was transferred to and accepted by a hazardous waste facility duly permitted by appropriate regulatory agencies of which he is not the beneficial owner or operator and that such transfer and acceptance is in compliance with applicable federal and State requirements existing at the time of the transfer and acceptance shall not be liable under subsection (b) for bodily injury or property damage caused by a hazardous waste occurrence after such transfer and acceptance.

(2) When signatures are admitted and established, production of a copy of a hazardous waste manifest entitles a defendant, who according to the manifest generated or transported the waste to a hazardous waste facility, to the defense under this subsection unless the claimant establishes that the waste was not in fact transferred to and accepted by the hazardous waste facility prior to the hazardous

waste occurrence.

(3) Each signature on a hazardous waste manifest is presumed to be genuine or authorized unless the party opposing its admission offers prima facie evidence that it is not genuine or authorized.

(f) No punitive or exemplary damages shall be awarded in any action under subsection (b).

(g) Nothing in this section shall deprive a claimant from electing to pursue any other cause of action based upon a hazardous waste occurrence that may exist under statutory or common law, or to deprive a person liable under subsection (b) of any right of contribution under the Uniform Contribution among Tort-Feasors Act, Chapter 1B of the General Statutes or indemnity he may have under law in existence at the time of the occurrence, nor shall anything in this section restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement or to seek the imposition by any State and federal authorities of civil and criminal sanctions. If the principal action was decided on the basis of strict liability, the principles of strict liability shall also apply in any action for contribution or indemnification arising out of the same hazardous waste occurrence.

(h) If any provision of this section or its application to any person or circumstances is held invalid by any court of competent jurisdiction, the invalidity will not affect other provisions or applications that can be given effect without the invalid provision or application; and to this end the provisions of this

act are severable.

Sec. 4. G.S. 1-52(16) is amended by changing the second sentence to read as follows:

"Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action; except that for any cause of action arising out of a hazardous waste occurrence as defined in G.S. 130A-291(8) no cause of action based on strict liability under G.S. 130A-307 shall accrue more than 30 years from the last act or omission of the defendant giving rise to the cause of action."

Sec. 5. This act shall become effective October 1, 1985.